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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1045

THE JUPITER CORPORATION,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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INDEX

PAGE

PETITION

Citations To Opinion Below 2

Jurisdiction 2

Question Presented 3

Statute Involved 3

Statement 4

Reasons For Granting The Writ 8

Conclusion 14

APPENDIX

Federal Power Commission Order On Petitions For Declaratory Relief, RI63-212, et al., issued April 3, 1968 ..... 1a

Federal Power Commission Order Granting Petition To Intervene And Denying Rehearing, RI63-212, et al., issued May 24, 1968 ..... 14a

Federal Power Commission Order On Motion To Enforce And Reducing Rates In Accordance With Previous Settlement And Opinion No. 546, RI63-212, et al., issued December 13, 1968 ..... 19a

Federal Power Commission Order Denying Request For Stay And Petition For Rehearing And Clarifying Previous Order, RI63-212, et al., issued January 22, 1969 ..... 34a

Opinion Of Court Of Appeals For The District Of Columbia Circuit Below 43a

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Jupiter Corporation (Petitioner) prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case, Nos. 22154 and 22693, on October 10, 1969.

Petitioner suggests that this case is appropriate for summary reversal on the question raised herein, on a *per curiam* basis, without argument.

CITATIONS TO OPINIONS BELOW

The orders of the Federal Power Commission reviewed by the Court of Appeals, which are printed in Appendix hereto, infra, pp. 1a, 14a, 19a and 34a, are reported in 39 F.P.C. 47, rehearing denied 39 F.P.C. 854, and 40 F.P.C. 1455 (1968), rehearing denied, 41 F.P.C. 72 (1969). The Opinion of the Court of Appeals, printed in Appendix hereto, *infra,* p. 43a, is as yet unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 10, 1969. (Appendix p. 43a, *infra.*) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254, 62 Stat. 928.

QUESTION PRESENTED

Does the federal system of regulation over the natural gas industry require reversal of the Federal Power Commission's action below, in which it exceeded its jurisdiction and violated contracts, and thus "filed rates," and denied Petitioner Due Process of Law; and reversal of the Court of Appeals decision, which decided the merits of the contract dispute between Petitioner and two large oil companies which question was not before the Court for decision, by interpreting the contracts involved, *even though the merits of the contract dispute were not adjudicated before the Commission* and *the Commission decision did not rest upon an interpretation of the contracts.*

STATUTE INVOLVED

The proceedings before the Federal Power Commission were pursuant to the Natural Gas Act, 15 U.S.C. 717, but subsection 717r is the only portion directly subject to interpretation herein.

STATEMENT

Petitioner purchases natural gas in the off-shore Louisiana area from Phillips Petroleum Company and Kerr McGee Corporation (PKM), carries it to shore in its small pipeline and resells it to Tennessee Gas Pipeline Co. (Tennessee). Petitioner's pipeline also carries liquid condensate owned by PKM, separates it from the gas and performs other services for PKM, all pursuant to contract. Its compensation for its services is the contractual margin between the purchase and resale prices. That margin varies with volumes, but is normally 2.4 cents per one thousand cubic feet (Mcf).*

The Federal Power Commission instituted an investigation of Petitioner's rates in 1962 (28 FPC 942) and finally approved a settlement by which the compensation of Petitioner for carrying the *natural gas* was set at 1 cent per Mcf (35 FPC 1091, rehearing denied 36 FPC 495 (1966)). Thereafter, Petitioner filed suit against PKM in the Circuit Court of Cook County, Illinois (No. 67 L 12177, action now pending)** to establish that it still has a contractual right to retain 2.4 cents per Mcf for the total services it performs for PKM, which in-

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* Petitioner also carries and separates gas and condensate for Union Oil of California (Union) and performs other services. It does not buy that gas, but instead collects a service charge. This transaction has been involved in the proceedings below, but is not involved in this appeal.

** Similarly, Petitioner filed suit in the United States District Court for the Northern District of Illinois against Union. (Case No. 67 C 1398) However, it was Union which withheld payments from Petitioner. The Federal Power Commission has not intervened in that dispute.

clude, but are not limited to, the carrying of gas. Since the Federal Power Commission also had set 19.5 cents per Mcf as the price which Petitioner could charge Tennessee, Petitioner retained 2.4 cents per Mcf and paid PKM at the resultant 17.1 cent per Mcf rate, all of which is appropriate under Petitioner's interpretation of the contract, which Petitioner is seeking to establish in such state court action. PKM protested against that level of payments, by Petition to Federal Power Commission, and on April 3, 1968 (39 FPC 47, rehearing denied 39 FPC 854), the Commission issued an order, which it later clarified, to require Petitioner to pay PKM 18.5 cents per Mcf (and retain 1 cent per Mcf), until such time as Petitioner established its interpretation of the contract in the state court action. That clarification, which Petitioner believed was necessary in light of the ambiguity of the April 3, 1968 order, came by Commission order of December 13, 1968. (40 FPC 1455, rehearing denied 41 FPC 72 (1969; Appendix, p. 19a).

Petitioner then appealed such Commission orders to the United States Court of Appeals for the District of Columbia, raising four points of error:

i. That the Commission erred in forbidding Petitioner from paying 17.1 cents per Mcf (and retaining 2.4 cents per Mcf) pending state court decision (and that the procedures used to enforce such ruling were invalid).

ii. That if the Commission order purported to hold that Petitioner could not pay 17.1 cents (and retain 2.4 cents per Mcf) even if and after the state court decided that such 2.4 cents charge was correct under the contracts between Petitioner and PKM,

such holding would also be in error on that ground too. (But Petitioner noted that it did not appear that the Commission's order did relate to such "post state court holding" period.)

iii. That the Commission's December 13, 1968 order was in error when it directed Tennessee to begin to make payments directly to PKM, rather than to Petitioner, as the contracts between the parties provide, because those contracts are filed with the Commission as the "filed rate" tariffs.

iv. That the Commission erred in its holding that it has jurisdiction to fix the rate for transportation of liquid condensate, which is not natural gas. However, Jupiter informed the Court that such holding had no practical consequences at this point and that deferral of ruling thereon until an appeal of an order which reiterated such holding in a context in which consequences attached was appropriate.

The Court of Appeals agreed that point iv was not ripe and deferred ruling on the jurisdictional question.

The Court of Appeals, as to points i and ii, upheld the Commission's order which precludes Petitioner's current payment of less than the Commission ordered 18.5 cents price (point i), but concurred (point ii) with the Commission finding that Petitioner's "total payments" to PKM would change if the state court ruled for Petitioner, stating:

"The possibility that Jupiter will recover some payments from PKM for condensate services in its Illinois lawsuit may eventually mean a reduction of total amounts owed by Jupiter to PKM, but this contingency does not entitle Jupiter to set off unliqui-

dated claims against the filed rate for jurisdictional services." (Court Opinion, Mimeo, p. 18; Appendix, p. 63a)

Petitioner does not here seek review of these holdings.

However, in the course of ruling that Petitioner could collect no more than 1 cent per Mcf until after state court decision, the Court of Appeals erred on two separate points, which Petitioner here seeks to reverse.

First, the court examined certain passages from the contracts between Petitioner and PKM and purported to hold that those contracts prevent Petitioner from paying less than 18.5 cents per Mcf to PKM and retaining more than 1 cent per Mcf. Yet the Commission has not ruled on such questions, so that the issue was not before the Court for affirmance or reversal.* Therefore, Petitioners here seek to reverse this holding of the Court, for reasons set forth hereinbelow.

Petitioners also here seek reversal of the Commission's violation of its authority and the "filed rates" herein, as described in point iii above, and the Court of Appeals affirmance thereof.

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* See "Reasons for Granting the Writ" for proof of this fact.

REASONS FOR GRANTING THE WRIT

Petitioner has been seeking, before the Federal Power Commission, to establish the proposition that while the Federal Power Commission is empowered, and should be empowered, to regulate the rates which the public will pay for natural gas, the Commission cannot regulate or otherwise affect that part of the revenues of Petitioner which the Commission itself has held do not relate to natural gas. Those revenues cannot affect the prices paid by consumers of natural gas and thus fall outside the Commission's area of jurisdiction.

The Commission has twisted and squirmed to avoid such limitation. Its major direct attempt has been an effort to exercise jurisdiction over liquid condensate, which is not gas. Review of this effort was deferred by the Court of Appeals on the correct basis that such ruling has not yet permanently affected Petitioner. But despite its eagerness to expand its jurisdiction, the Commission has been forced to recognize that the merits of the contract dispute between Petitioner and PKM were for the Illinois state court to decide. Accordingly, the Commission held (see Appendix hereto, page 9a):

> "Jupiter's claim in effect is that it is entitled to offset the payments it is required by Opinion 470 to make to Phillips-Kerr-McGee for the gas purchased from these producers, by the sums allegedly due it from Phillips-Kerr-McGee for the transportation, separating and storing of condensates which are separated from the gas stream eventually sold to Tennessee and returned to the producers. The producers deny Jupiter is contractually entitled to any recompense for such activities.

> "*We do not believe any public interest objective would be achieved by our attempting to resolve such contractual issues. This is an area in which we possess no special expertise which would be applicable in any subsequent judicial proceedings.* See *Texas Gas Transmission Co.* v. *Shell Oil Co.*, 363 U.S. 263 (1960); *Pure Oil Co.* v. *F.P.C.*, 299 F. 2d 370 (CA7, 1962). Moreover, in the present situation any judicial remedy available to Jupiter may well be a matter of equity rather than of law. . . ." (emphasis added.)

Two points must be noted. First, the Commission clearly did not resolve the contract question; it declined to do so. Second, the Commission noted that such question "*may* well be a matter of equity rather than law." But the Commission did not decide it *was*, since to do so would have been to decide the contract issue which the Commission expressly declined to decide.

Further, the Commission also stated (Appendix hereto, p. 12a):

> "As in the case of the Phillips-Kerr-McGee transaction, we see no reason at this time to attempt to resolve any contractual issue which may exist between Union and Jupiter as to the latter's right to compensation for services allegedly performed for Union, with respect to that part of the gas stream Jupiter physically receives from Union but which is not purchased from Union by Tennessee."

It is clear, therefore, that the Commission did not interpret the contracts. But despite the Commission's refusal to decide the contract question, the Court of Appeals, (at Mimeo pages 9-11, Appendix hereto, pages 52a-54a) did "decide" that question stating:

> "Jupiter claims that the 18.5 cent rate is unlawful under Mobile because its contract with PKM permits it to deduct a 2.4 cent spread from whatever

> price is received from Tennessee. Thus, when its resale price to Tennessee was fixed at 19.5 cents in the rate settlement, the contract price payable to PKM became 17.1 cents. The contract, however, does not support this contention." (Mimeo Opinion, p. 9).

It was clear error for the Court to hold as to what "the contract does not support": Not because the Court's interpretation of the contract is incorrect,* but rather because the contract issue was not before the Court of Appeals, since (properly) it had not been decided by the Commission. For the Court to rule upon an issue which is not before it is clear error.

The scope of review of a Court of Appeals under the Natural Gas Act is limited to affirmance, modification or setting aside of a Federal Power Commission order on issues preserved in applications for rehearing. Natural Gas Act, §19(b), 15 U.S.C. §717r (b). There is no authority in the Court of Appeals to take other action or to consider other issues as may be true under statutes which permit the appellate court to act "as justice may require." Compare *Hormel* v. *Helvering,* 312 U.S. 552, at 555-557 (1941).

A Court of Appeals may not consider *sua sponte* any objection to a Federal Power Commission order which was not urged in the application for rehearing to the Commission. *FPC* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, at 498-499 (1955). The Supreme Court granted the petition for writ of certiorari in the *Colorado* case and reversed the Court of Appeals because of the "importance of such a result [a Court of Appeals considering

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* Although Petitioner believes it is wrong, because based on incomplete information.

sua sponte issues not properly before it] in relation to the judicial review of administrative orders." (348 U.S. at 496)

That error was used by the Court to continue in force the Commission's opinion, which currently deprives Petitioner of substantial revenues. Additionally, however, the Court of Appeals' interpretation of the contracts will undoubtedly, if allowed to stand, be cited against Petitioner in the Illinois State Court action based upon such contracts, and in any further Commission proceedings thereon.

What compounds the error of the Court involved in its deciding of the contract issue is that the issue was not tried or briefed before the Commission or briefed before the Court of Appeals. PKM did brief and argue that non-issue—*albeit* very selectively—so that the Court heard and saw only that one side of the question. But Petitioner did not, because the issue was not decided below and thus was not available for decision on review. Thus the Court heard only one side of the "issue," and yet decided the issue which was not before it.

Placed in the context of the fact that the contracts involved cover both gas and non-gas services, it is apparent that the Court of Appeals has improperly advanced regulatory intrusion into jurisdictionally prohibited areas, by its error of deciding an issue not before it for decision. Thus, this case has broad significance to the system of federal regulation, particularly in the natural gas field.

The conclusion that this case has broad significance to federal regulation is further supported by the second point of error raised herein: that the Commission went

far beyond its power under the Natural Gas Act and clearly violated two specific provisions of that act in its December 13, 1968 Order. (Appendix p. 19a). First, the Commission's December 13, 1968 Order modified its April 3 and May 24, 1960 Orders, even though, at that time, the record on appeal of the prior orders had been filed in these proceedings. This modification is in violation of Section 19(a) of the Natural Gas Act (15 U.S.C. § 717r(a), which prohibits modification of an order which has been appealed. The Court of Appeals skirted this issue and failed to meet it, by alleging, apparently, that "compliance" action is an exception to the statute, but gives no support therefor.

Secondly, the Commission's December 13, 1968 Order directed Tennessee (the purchaser from Petitioner) to stop paying 17.5¢ of the 18.5¢ it was paying Petitioner, and begin to pay it to PKM (the sellers to Petitioner). Yet, the contracts between the parties called for payment direct to Petitioner, and those contracts are filed with the Commission and are the "filed rates" between the parties (the official FPC rate tariffs). Such action violates the "filed rate doctrine," *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951). The Court of Appeals has skirted this point by not justifying the specific action taken, but instead merely holding that use of "a judicial remedy is discretionary" and that the December 13, 1968 "enforcement order" under Section 20 of the Natural Gas Act was therefore "a permissible step." The Court thus avoided the question raised: whether the specific type of "enforcement order" was appropriate or, instead, in violation of the filed rate doctrine.

Additionally, such action, which is a garnishment of Petitioner's property, denies Petitioner due process of law. In *FPC* v. *Metropolitan Edison Co.,* 304 U.S. 375, 386 (1938), this Court held that the Commission has no authority to enforce its directives, save by application to a Federal court, and that a party is entitled to the judgment of a court before obedience can be compelled. See also *United Gas Pipe Line Co.* v. *FPC,* 181 F. 2d 796 (D.C. Cir.), *cert. denied* 340 U.S. 827 (1950); *Mississippi Power & Light Co.* v. *FPC,* 131 F. 2d 148 (5th Cir. 1942). By allowing the Commission to enforce its own directives, without recourse to judicial process, the court below deprived Petitioner of substantial constitutional rights. See *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 46, 47 (1937) and *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 48 (1938).

Petitioner suggests that the errors of the Court of Appeals which are here under review—at least the Court's decision of an issue not before it—are so uncomplicated that this case may be summarily reversed, *per curiam,* without briefs or argument.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

PAGE

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Opinion Of Court Of Appeals For The District Of Columbia Circuit Below 43a

CAPTION

[3728]*

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Declaratory Order — Rates (Transportation Service)
Before Commissioners: Lee C. White, Chairman;

L. J. O'Connor, Jr.,
Charles R. Ross,
Carl E. Bagge, and
John A. Carver, Jr.

The Jupiter Corporation	Docket Nos.
Union Oil Company of California	RI63-212
Phillips Petroleum Company and	G-16790
Kerr-McGee Corporation	RI68-111

ORDER ON PETITIONS FOR DECLARATORY RELIEF

(Issued April 3, 1968)

This proceeding involves still another chapter in the long history of this Commission's regulation of the just and reasonable rates to be charged by Jupiter Corporation (Jupiter) for certain operations it has been and is conducting in connection with a pipeline it owns and operates between the Rollover Field, offshore Southern Louisiana, and the facilities of Tennessee Gas Pipeline Company, a Division of Tenneco, Inc. (Tennessee) onshore in Louisiana. By our order of June 28, 1966, approving a Jupiter proposed settlement in Docket No. RI63-212 we had thought we had brought this long litiga-

* Page numbers in Federal Power Commission Record.

tion to an agreed and reasonable conclusion. The petitions filed in the above-captioned proceedings by Phillips Kerr-McGee and Tennessee[1] show that we were overly optimistic in this belief.

Jupiter, through its pipeline facilities, performs a number of separate functions coming within the aegis of this Commission's **[3729]** jurisdiction. It purchases gas from Phillips Petroleum Company and Kerr-McGee Corporation (Phillips Kerr-McGee), which it transports onshore and resells to Tennessee. It also for a fee transports to the Tennessee pipe line facilities gas which Union Oil Company of California (Union), as successor to the Pure Oil Company (Pure), sells to Tennessee. Finally, and this is the root of the present contest, it transports through these same facilities a limited amount of condensate and heavy hydrocarbons, which though part of the gas stream as delivered to Jupiter by Phillips Kerr-McGee and Union, are not part of the gas sales to Tennessee but are separated out and returned to the producers.

Pursuant to our decision of August 11, 1965 in Opinion No. 470, *Phillips Petroleum Co., et al.*, Dockets No. G-16611, *et al.*, 34 FPC 486, Phillips Kerr-McGee was certificated to make its sale of natural gas to Jupiter at an initial price of 18.5 cents per Mcf, and Jupiter, pending the outcome of the in-progress Section 5 rate proceeding in Docket No. RI63-212, was granted a modified temporary certificate authorizing it to charge Tennessee no more than 20.9 cents per Mcf for the gas it obtains from Phil-

[1] Petition of Phillips Kerr-McGee for Order Directing The Jupiter Corporation to Pay the Filed Rate for Purchased Gas, filed August 30, 1967, Petition of Tennessee for Order Directing Jupiter and Union to comply with Commission Orders filed June 1, 1967.

lips Kerr-McGee and resells to Tennessee.[2] In an order of November 27, 1962, Union's predecessor Pure, as part of a settlement of its company wide rate case, had been authorized to charge for the gas it sold to Tennessee under its Rate Schedule No. 40, 16.75 cents **[3730]** plus transportation.[3] The 16.75 cent base rate has subsequently, been increased, subject to refund in Docket No. RI68-40, to 17.75 cents, effective January 8, 1968.

The appropriate just and reasonable rate for Jupiter's transportation of gas for Pure and the determination of the just and reasonable price Jupiter should charge for the gas it sold to Tennessee were in issue in Docket No. RI 63-212. On January 5, 1966, Presiding Examiner Ellis issued an Initial Decision holding that both of these transactions were subject to the Commission's jurisdic-

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[2] Previously, Jupiter had charged Tennessee 22.8333 cents per Mcf for the gas pursuant to a temporary certificate issued on May 24, 1962.

[3] In the order approving the settlement the Commission stated (28 FPC at 891) "[Pure] proposes a settlement rate of 16.75¢ per Mcf, plus reimbursement of the charges Pure has to pay for transportation. Pure has agreed to charge only that amount it actually has to pay for the transportation of the gas onshore, and to make any necessary filing in the future to reflect any change that may be made therein. We believe that under all the circumstances the proposed settlement rate for this sale should be approved."

In a footnote to the rate schedule in the Appendix annexed to the Commission's order, the "16.75¢ Trans." settlement price is further explained. The note indicates that Jupiter was then charging Pure for transportation from the field 10 miles offshore to Tennessee's main line onshore 4.0¢ per Mcf for the first 62.5 MMCFD and 3.0¢ per Mcf for the remainder. It goes on to say "These charges to be recouped from Tennessee as part of the rate will be only those actually paid by Pure to Jupiter, its successors or assigns. Any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure."

tion, and fixing just and reasonable rates for such operations (See 35 FPC 1095-1133). Prior to decision on exceptions by the Commission, Jupiter filed a proposed settlement, which as described in the Commission's order of approval, proposed, inter alia, that it (1) would file a rate schedule "providing for a charge of 1.0¢ per Mcf (at 15.025 psia) for transporting gas for Union" and (2) Jupiter would file a supplement to its rate schedule for **[3731]** its sale to Tennessee "providing for a contractual sale price to Tennessee of 19.5¢ per Mcf for the remaining portion of the current pricing period and for the next four year price redetermination period." (35 FPC at 1092). Following acceptance of the settlement Jupiter made these filings.

The present questions arise out of another feature of Jupiter's settlement offer relating to its claimed rights to separate reimbursement from Union and Phillips Kerr-McGee for the transportation of liquids for these producers as well as certain other services it assertedly performs for the producers with respect to this portion of the gas stream which never gets to Tennessee. In its settlement proposal Jupiter stated its offer was made "with an express understanding that Jupiter does not waive its rights with respect to the collection from Phillips Kerr-McGee and Union of compensation for services Jupiter performs in transporting, separating or storing those producers' condensates and liquefiable hydrocarbons." (35 FPC at 1092) In their responses to Jupiter's settlement offer Phillips Kerr-McGee objected to the proposed settlement to the extent that it would in effect reduce its firm rate of 18.5¢ per Mcf by requiring Phillips Kerr-McGee to reimburse Jupiter for the service of transporting and separating the condensate contained in the gas stream. Con-

tending that under their contracts with Jupiter such operations were to be without charge, Phillips Kerr-McGee stated that there was no reason for them to revise their contracts with Jupiter to provide additional reimbursement for Jupiter. Union, in response to the settlement agreement, also objected to any proposal which might require it to contribute any sums to Jupiter for the purposes of alleviating the economic difficulties Jupiter envisioned might result from effectuation of the examiners' decision.

In the light of these objections, the Commission, in approving the settlement, expressly stated (35 FPC at 1094):

> Jupiter's reservation of claimed rights with respect to the collection from Union and Phillips Kerr-McGee of compensation for transporting, **[3732]** separating or storing those producers' condensates and liquefiable hydrocarbons and the producers answers on that point does not present any issue to be determined at this time. Any contractual arrangements Jupiter makes with the producers for those services will be acted upon if and when they are appropriately submitted to the Commission.

Phillips-Kerr-McGee was not satisfied with this resolution of the issue. It filed an application for rehearing objecting to the statement quoted above to the extent it implied that there were contractual arrangements between Jupiter and the producers relating to transportation and processing of condensate or liquefiable hydrocarbons, remaining open for negotiation. Phillips reiterated its claim it had contracted for free services with respect to these operations and that this arrangement remained in force. The Commission, in an "Order Clarifying Prior Order

and Denying Rehearing", issued August 22, 1966 (36 FPC 495), stated:

> The quoted sentence neither implies that further contractual arrangements are open for negotiations nor requires that further negotiations be held. That sentence merely indicates that we are not now determining the claimed rights of any party on this matter . . .

In conformity with the Commission's settlement order, Jupiter filed changes in its FPC Gas Rate Schedules Nos. 7 and 8 for the transportation of gas "delivered to Tennessee . . . for the account of Union" and for sale of gas (purchased from Phillips-Kerr-McGee) to Tennessee. On December 9, 1966, the Commission's Secretary wrote Union pointing out that "the transportation charge of the Jupiter Corporation applicable to gas sold under your FPC Gas Rate Schedule No. 120 was reduced to 1.0¢ per Mcf, effective May 15, 1966," and that Union in its settlement had "agreed to make the necessary filing to reflect any change in such transportation charge . . ." He requested that Union accordingly make the requisite filing. However, Union, by telegram to the Commission Secretary of December 16, 1966, "respectfully declined" to do so. Union contended therein **[3733]** that Pure's settlement, as approved by the Commission, provided for a fixed payment by Tennessee to Union "plus the charges actually paid by Pure (now Union) to Jupiter", and that "inasmuch as Union was not a party or a participant to the Jupiter settlement proceeding the settlement and approval thereof did not modify Union's contract with Jupiter or with Tennessee" . . . It indicated that Jupiter had submitted to it two invoices totaling the full transportation rate originally charged prior to the Jupiter settlement, and that in view of the Commission's order

in the Pure settlement, allegedly approving the total transportation charge as part of Tennessee's rate, it would not be proper to reduce the rate. This matter has not yet been resolved by the Commission.

The present proceeding comes to us as a result of the petitions filed by Tennessee and Phillips-Kerr-McGee which are directly related to two pending court proceedings initiated by Jupiter. In one case, filed by Jupiter in the U. S. District Court for the Northern District of Illinois, against Union, in which Tennessee has been named as a third party defendant by Union, Jupiter is seeking a determination that the proper rate for all of the services it performs under its contract with Union is 3.4¢ per Mcf, and Union is arguing that if this is true it is entitled to collect the entire sum from Tennessee in addition to its base rate of 17.75¢ per Mcf.[4] In the other case filed by Jupiter against Phillips and Kerr-McGee in the State Circuit Court for Cook County, Illinois, Jupiter is contending that under its contract with those producers it is obligated to pay only 17.1¢ per Mcf in lieu of the certificated price of 18.5¢ per Mcf.[5] In both cases, as here, Jupiter asserts its contract rights as against the producers were not impaired by the settlement order approved by the Commission since all sums due it under the contracts, over and beyond the 1.0 cent authorized for the transportation and sale of gas in the settlement, [3734] can and must be deemed due it as compensation for the services it performs for the producers with respect to condensate and liquefiable hydrocarbons. Both Phillips-

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[4] *The Jupiter Corporation* v. *Union Oil Company of California*, Civil Action No. 67C1398, and *Union Oil Company of California* v. *Tenneco, Inc., id.*

[5] *The Jupiter Corporation* v. *Phillips Petroleum Company and Kerr-McGee Corporation*, No. 67L12177.

Kerr-McGee and Tennessee have filed motions in the judicial proceedings to dismiss or stay the actions on grounds that this Commission has primary jurisdiction over the subject matter, and the Tennessee and Phillips-Kerr-McGee petitions here in issue seek to have us exercise such jurisdiction.[6]

For convenience, we have treated our analysis below of the Phillips-Kerr-McGee—Jupiter—Tennessee transaction separately from that involving Union—Jupiter and Tennessee.

The Phillips-Kerr-McGee—Jupiter—Tennessee Transaction

We believe it beyond dispute that, pursuant to the final orders of this Commission in Opinion No. 470 and approving the Jupiter settlement, as fully described above, Jupiter must pay Phillips-Kerr-McGee 18.5 cents (at 15.025 psia) for each Mcf of natural gas it purchases from those producers and must charge Tennessee no more than 19.5 cents per each Mcf of gas which the latter purchases from Jupiter, at the tail gate of Phillips' extraction plant downstream on Tennessee's line from the point at which Tennessee physically takes delivery from Jupiter.[7] We do not understand Jupiter to disagree insofar as its sale price to Tennessee is concerned.

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[6] On January 31, 1968, the U. S. District Court issued an order staying all further court proceedings pending a resolution by this Commission of the matters raised in the present pleadings. On January 12, 1968, the state court denied Phillips-Kerr-McGee's motion for stay.

[7] The volumes of gas which Tennessee receives are devoid of condensates and liquefiable hydrocarbons, the former having been removed from the gas stream at Jupiter's separating plant and the latter extracted at Phillips' plant. (Docket No. RI63-212, Transcript 84, 85.)

[3735]

Jupiter's claim in effect is that it is entitled to offset the payments it is required by Opinion 470 to make to Phillips-Kerr-McGee for the gas purchased from these producers, by the sums allegedly due it from Phillips-Kerr-McGee for the transportation, separating and storing of condensates which are separated from the gas stream eventually sold to Tennessee and returned to the producers. The producers deny Jupiter is contractually entitled to any recompense for such activities.

We do not believe any public interest objective would be achieved by our attempting to resolve such contractual issues. This is an area in which we possess no special expertise which would be applicable in any subsequent judicial proceeding. See *Texas Gas Transmission Co.* v. *Shell Oil Co.*, 363 U.S. 263 (1960); *Pure Oil Co.* v. *F.P.C.*, 299 F. 2d 370 (CA7, 1962). Moreover, in the present situation any judicial remedy available to Jupiter may well be a matter of equity rather than of law. It is, we believe, sufficient here to note that, under the Natural Gas Act, transportation of such portions of the natural gas stream received by Jupiter from Phillips-Kerr-McGee, but not resold to Tennessee, is just as much subject to our jurisdiction as the remaining portion of the gas stream, even though it may consist of condensates and heavier hydrocarbons subsequently extracted and sold non-jurisdictionally as liquids. See *Deep South Oil Co.* v. *F.P.C.*, 247 F. 2d 882, 888 (CA5, 1957), certiorari denied 355 U.S. 930; *Panhandle Eastern Pipeline* v. *F.P.C.*, 359 F. 2d 675, 682-683 (CA8, 1966); *Louisiana Public Service Commission* v. *F.P.C.*, 359 F. 2d 525 (CA5, 1966), certiorari denied 385 U.S. 833. This means that, even if it were to be determined that Jupiter was contractually entitled to reim-

bursement for the transportation services it provides for Phillips-Kerr-McGee, it would not be entitled to payment therefor unless and until it secures a certificate for such transportation at an appropriate rate. It is equally clear that, contrary to Jupiter's apparent claim, any charge for performing jurisdictional transportation activities for Phillips-Kerr-McGee would have to be measured by the approximate five percent of the gas stream **[3736]** received from those producers which is not sold to Tennessee rather than to the total volumes of the stream.[8]

It is recognized that, in addition to the transportation performed for the jurisdictional sales, Jupiter claims the right to payment under its contract for other services of a non-jurisdictional nature. In order to facilitate further administrative proceedings it is to be hoped, therefore, that any judicial determination that Jupiter is, as a matter of private obligation, entitled to any payments by Phillips-Kerr-McGee would segregate any amount due for said transportation from any other obligations to Jupiter the producers may be found to have.

The Union—Jupiter—Tennessee Arrangement

Here we have a more complex situation and one which, insofar as it involves disagreement as to the interpretation of our orders, clearly requires Commission guidance. The problem is a twofold one, since it involves not only Jupiter's relations with Union, dealt with in the 1966 settlement of Jupiter's rate case, but Union's rate for the sale of gas to Tennessee, as fixed by the 1962 rate settlement of Pure, Union's predecessor.

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[8] It is clear that in fixing this price, the one-cent per Mcf settlement charge would not necessarily pertain. As indicated above, this settlement applied only to the transportation of gas redelivered to Tennessee.

There can be no real dispute with the fact that the presently authorized rate for the transportation service Jupiter performs in bringing the gas Union has sold to Tennessee to the Tennessee main line onshore is 1.0 cent per Mcf. Not only is this the unequivocal holding of our order of June 28, 1966, but, consistent therewith, Jupiter filed a change in its Rate Schedule No. 7, effective May 15, 1966, expressly so providing. Union's claim that the Commission's order is not binding on it because it was not a party to the Jupiter rate case is devoid of merit. Union (or its predecessor Pure) was, or should have been well aware of [3737] the case from its initiation;[9] its decision not to intervene and participate as a party was its own. Moreover, with special reference to the settlement agreement, Union was not only advised both of the settlement offer, and a prior one, but filed comments thereon with the Secretary of this Commission.[10] It is true that in these comments Union objected to the settlement (as did Phillips); but if it did not like the result (and if the result in part injured Union) it was free to seek rehearing and court review. It chose not to do so.

The other facet of Union's argument is equally lacking in substance. The Pure rate settlement cannot, as Union apparently would have it, be construed as fixing a rate for the sale of gas to Tennessee at a fixed price, plus the cost not only of transporting this gas, but the part of the gas stream initially received by Jupiter from Pure but never redelivered to Tennessee. As indicated in footnote 3, supra, the body of the Commission's order approving the Pure settlement expressly refers to "that amount [Pure] actually has to pay for transportation of

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[9] Pure was served with a copy of the Commission's order, issued December 5, 1962, instituting the investigation of Jupiter's rates.

[10] Union's letters, filed April 15, 1966, and June 2, 1966.

the gas onshore." And while neither the original contract under which Pure sold gas to Tennessee, its rate settlement agreement, which had been submitted for the Commission's approval, or the Appendix to the Commission's order, in terms, expressly characterizes the **[3738]** transportation involved as the transportation of the gas[11] actually delivered to Tennessee, there is nothing in the language utilized which requires or suggests any other construction. It would be a most peculiar sales arrangement under which Tennessee would agree to pay a producer for the costs of transporting onshore that part of the gas stream which Tennessee does not receive, but which is, instead, returned by transporter to the producer. No such obligation can be spelled out, or even implied, from the orders or underlying contracts in issue here.

As in the case of the Phillips-Kerr-McGee transaction, we see no reason, at this time, to attempt to resolve any contractual issue which may exist between Union and Jupiter as to the latter's right to compensation for services allegedly performed for Union, with respect to that part of the gas stream Jupiter physically receives from Union but which is not purchased from Union by Tennessee. Any such obligations are totally unrelated to the price Union may charge Tennessee as part of its filed rate; neither Jupiter nor Union have asked us to pass upon Jupiter's alleged rights to additional compensation from Union. As in the case of Phillips-Kerr-McGee, any transportation of condensates or hydrocarbons Jupiter performs for Union over and above the transportation of the gas it delivers to Tennessee, will itself involve jurisdictional transportation subject to certification and rate

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[11] Contained in Supplement No. 9 to Union's FPC Gas Rate Schedule No. 120, filed December 26, 1962.

regulation by this Commission, and the appropriate rate for any such transportation would relate solely to the portion of the gas stream not redelivered to Tennessee. Thus here too, we would hope and expect any judicial determination of any Jupiter entitlement to reimbursement as a matter of private law would segregate the amounts attributable to such jurisdictional activities which would then be subject to regulation by this Commission) from any amounts due for non-jurisdictional services.

Accordingly, the Commission finds and concludes:

(A) Union is, and since May 15, 1966, has been, obligated to pay Jupiter 1.0¢ per Mcf pursuant to Jupiter's FPC Gas Rate Schedule No. 7.

[3739]

(B) Union is, and since May 15, 1966, has been, authorized to charge Tennessee no more than 1.0¢ per Mcf over and above its base rate under Union's FPC Gas Rate Schedule No. 120.

(C) Jupiter is, and since August 11, 1965, has been, obligated to pay Phillips-Kerr-McGee the latters' prescribed certificate rate of 18.5¢ per Mcf under Phillips' FPC Gas Rate Schedule No. 329 and Kerr-McGee's FPC Gas Rate Schedule No. 56, respectively.

(D) Jupiter is, and since May 15, 1966, has been, authorized to charge Tennessee 19.5¢ per Mcf for the gas sold by Jupiter to Tennessee under Jupiter's FPC Gas Rate Schedule No. 8.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Acting Secretary.

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CAPTION

[3821]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and John A. Carver, Jr.

	Docket Nos.
The Jupiter Corporation	RI63-212
Union Oil Company of California	G-16790
Phillips Petroleum Company and	RI68-111
Kerr-McGee Corporation	

ORDER GRANTING PETITION TO INTERVENE AND DENYING REHEARING

(Issued May 24, 1968)

On April 3, 1968, this Commission issued an order in which we hoped that we made clear our view that the Jupiter Corporation (Jupiter) and Union Oil Company of California (Union), had, through an extended period of time, evaded the terms of settlement orders into which they had entered in 1966 and 1962, respectively. Applications for rehearing[1] have been filed by Jupiter, Union and G. Burton Liese[2].

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[1] The Applications of Jupiter and Union were filed on May 2, 1968; that of G. Burton Liese on May 3, 1968.

[2] G. Burton Liese is a preferred stockholder of Jupiter who, on July 13, 1967, filed a petition for leave to intervene in this proceeding. As a result of an intervening Delaware Court of Chancery proceeding culminating in an order of April 5, 1968 which Mr. Liese has attached to his application for rehearing, it now appears that the interests of the preferred stockholders may be to some degree different than the interests of Jupiter's management. Consequently, in the interests of substantial justice and for the purpose of allowing representation of all proper interests herein, we now grant the petition of July 13, 1967 for leave to intervene.

The Commissions' order of April 3, 1968, held that Jupiter, as a result of the settlement into which it earlier entered, is bound to charge no more than 1¢ per Mcf for the transportation of gas from Union's offshore platforms to the Tennessee pipeline, and to restrict itself to a margin of 1¢ **[3822]** per Mcf on the gas which it purchases from Phillips-Kerr-McGee and sells to Tennessee. As there noted, Jupiter is a party to two basic contracts, with Phillips-Kerr McGee and with Union, which provide for the performance of several functions by Jupiter. Leaving aside the difference in form of the contracts, which is adequately explained by the April 3 order, these functions are both jurisdictional and nonjurisdictional. It is apparent, however, that the major function which Jupiter was to perform under the contracts was the transportation of gas from the offshore platforms at which it accepted the gas to the Tennessee pipeline, and that the vast bulk (if not all) of the rates which the Examiner found in Docket No. RI63-212 to be unjust and unreasonable was intended to serve as recompense for that service.[3] But Jupiter also transported condensate to its onshore separation plant and removed that condensate from the gas stream in which it had been mixed. In addition, the gas stream remaining after the removal of the condensates was delivered to a plant operated by Phillips in which certain of the heavy hydrocarbons were removed by liquefaction before final delivery to Tennessee.

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[3] The cost of service data introduced in Docket No. RI63-212 indicated that the expense of providing this service ($258,431 in the test year) was far in excess of the expenses involved in all the other services combined ($15,828 in the test year). Exhibit 2, Schedule 4. The examiner's decision in that proceeding was superseded by a settlement agreement.

The condensate is part of the raw natural gas emerging at the well head, and is part of the raw gas stream as transported. Jupiter's attempt to distinguish the transportation of condensate from that of the remainder of the gas stream is, in reality, solely an exercise in semantics. There is, in **[3823]** Jupiter's lines, but one raw gas stream, and the condensate is a part of it. While this Commission does not assert jurisdiction to regulate the price at which liquids are sold after their removal from the gas stream, it does assert jurisdiction in this proceeding over any rates which Jupiter may charge for its transportation of the condensate and liquefiable hydrocarbons as a part of the gas stream.[4]

To the extent that Jupiter may be found in its present court proceedings to be due some amount for the nonjurisdictional services performed, these amounts may not be commingled or confused with the amounts due for jurisdictional services in Jupiter's accounts. Jupiter and its stockholder raise no other points not adequately disposed of in our original order.

The Commission's April 3 order held that Union was authorized to charge Tennessee no more than 1.0¢ per Mcf over and above its base rate under Union's Gas Rate Schedule No. 120 as filed with this Commission. Union's application for rehearing makes two points. First, it repeats its contention that it is entitled to receive from Tennessee, and ultimately the consuming public, the amounts which it may have to pay Jupiter for services

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[4] Since the date of rendition of our original order, the Supreme Court, in Permian Basin Area Rate Cases ..... U.S. ..... (May 1, 1968), at p. 67, nn 111 (Slip Opinion), affirmed this Commission's assertion of jurisdiction over the total raw stream of casinghead gas, which includes entrained liquids. Area Rate Proceeding, Docket No. AR61-1, 34 F.P.C. 159, 209.

which accrue only to the benefit of Union and not to the benefit of Tennessee, as well at the 1¢ per Mcf which it pays Jupiter for the transportation of the gas which Tennessee receives. As noted in our previous order in this proceeding, this argument flies in the face of the Commission's **[3824]** settlement order in Docket No. G-16790. The Commission plainly understood that Pure, Union's predecessor in interest, proposed to charge Tennessee only the amount of the expenses which Pure incurred for the transport of the gas delivered to Tennessee. (See footnote 3 of the April 3 opinion herein.) If Pure truly intended, in its settlement agreement, that it would collect from Tennessee reimbursement for all expenses paid to Jupiter by Pure, then Pure and Union, its successor, have remained strangely silent about this intent since the order approving the settlement stated a contrary understanding.

Union's second point repeats the allegation that it was not bound by the Jupiter settlement because it was not a party thereto. This point was, in the main, adequately dealt with in our prior order. The suggestion by Union, however, that it repeatedly requested a hearing over a period in excess of a year, is without merit. It refers to no such requests, and we have found none in examination of Docket No. RI63-212. Its contention that it was denied due process because it could not seek review of that order is equally without merit, because it never sought to intervene in that proceeding or, like Phillips, to seek rehearing thereof. If, as it now appears to state (Application for Rehearing, p. 7) was not the case, it was aggrieved by our acceptance of the Jupiter settlement, it could have taken the necessary steps to establish its right to secure review.

No other points raised by the applicants have sufficient merit to warrant separate treatment.

The Commission orders:

(A) The petition of G. Burton Liese to intervene in these proceedings is granted.

(B) The Applications for rehearing filed herein by Union Oil Company of California, Jupiter Corporation and G. Burton Liese are denied.

By the Commission.
(SEAL)

Gordon M. Grant,
Secretary.

CAPTION

[3868]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Enforcement Order—Rates (Transportation Service)
Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Carl E. Bagge, and John A. Carver, Jr.

	Docket Nos.
The Jupiter Corporation	RI63-212
Union Oil Company of California	G-16790
Phillips Petroleum Company and	RI68-111
Kerr-McGee/Corporation	

ORDER ON MOTION TO ENFORCE AND REDUCING RATES IN ACCORDANCE WITH PREVIOUS SETTLEMENT AND OPINION NO. 546

(Issued December 13, 1968)

On December 5, 1962, this Commission issued an order instituting an investigation of the rates of the Jupiter Corporation (Jupiter). 28 FPC 942. Jupiter transports natural gas from the Rollover Field, offshore South Louisiana to an onshore delivery point to Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee). It transports gas for Union Oil Company of California (Union), and is paid for the carriage thereof. It provides a similar service for Phillips-Kerr-McGee, but the transaction is cast in the form of a sale to Jupiter by Phillips-Kerr-McGee and a resale to Tennessee by Jupiter. The contract under which Phillips-Kerr-McGee had been selling gas to Jupiter had provided for a rate based upon the rate received by Jupiter for its sales to Tennessee.

In our order of December 5, 1962, we noted that Jupiter received an average of 3.4¢ per Mcf from Union (then Union's predecessor, the Pure Oil Co.) and an average of 2.3¢ per Mcf spread between the price it paid Phillips-Kerr-McGee[1] and the price it received from Tennessee, and that these rates might be unjust, unreasonable, unduly discriminatory or preferential.

[3869]

On January 5, 1966, the examiner issued his recommended decision in the case, 35 FPC 1095. He noted, *id.* at 1114, that Jupiter had caused much delay in the proceeding, and the procedural history of the case (set out at 35 FPC 1096-1098) fully supports that observation. He also found that the rates Jupiter had charged were unjust and unreasonable, and that Jupiter was entitled to a reimbursement for its services in transporting natural gas, both as to the Union transportation and the Phillips-Kerr-McGee purchase and Tennessee sale, of an amount which worked out to .632¢ per Mcf. While the proceeding was pending on exceptions, Jupiter filed a settlement proposal based on a 1.0¢ per Mcf settlement rate for both transactions. On June 28, 1966, we accepted that settlement offer, 35 FPC 1091, holding, as to the Phillips-Kerr-McGee portion of Jupiter's services, the spread which Jupiter was to receive would be based on the 1.0¢ per Mcf rate.

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[1] In Opinion No. 470, *Phillips Petroleum Co. et al.*, 34 FPC 486 we held that the proper in-line rate for the Phillips-Kerr-McGee sale to Jupiter was 18.5¢ per Mcf, and ordered the sale price reduced to that figure.

In 1967 Phillips-Kerr-McGee[2] filed a petition with the Commission seeking an order directing Jupiter to pay the 18.5¢ per Mcf filed rate for the gas it purchased for resale to Tennessee. In opposing that petition, Jupiter took the position that because it performed certain services for Phillips-Kerr-McGee which were assertedly non-jurisdictional, in addition to the jurisdictional transport of gas for resale to Tennessee, it was contractually entitled to reduce its payment to Phillips-Kerr-McGee by the same amount per Mcf that it had been required, by the terms of the settlement, to reduce its rates to Tennessee. Because all these services were covered in one contract, Jupiter contended, it could simply offset the reduction which the Commission had ordered in its jurisdictional rates by an automatic increase in its receipts for the allegedly compensable non-jurisdictional services. This assertedly automatic increase was of the same amount per Mcf as it had been required to reduce its rates to Tennessee. The effect of this action would be to retain the full "spread" which the examiner had earlier found **[3870]** to be far in excess of any justifiable rate, and which had supposedly been reduced by the Commission's order approving the settlement agreement.

On April 3, 1968, the Commission issued an order, ... FPC ....., which rejected these arguments of Jupiter. We held that some of the functions which Jupiter asserted to be non-jurisdictional were in fact within the jurisdiction of this Commission, and that the remaining services ap-

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[2] Tennessee Gas Pipeline Company also filed a petition with the Commission seeking similar relief, but with respect to gas transported by Jupiter for Union Oil Company of California. That petition is not here in issue, however.

peared to be quite minor. We noted that Jupiter could not, under the Natural Gas Act, collect any fees from Phillips-Kerr-McGee for the jurisdictional transportation services until it secured a certificate for those services at an appropriate rate. And we noted that if Jupiter were entitled to reformation of its contract with Phillips-Kerr-McGee in order to establish some payment for the remaining minor non-jurisdictional services it performed for Phillips-Kerr-McGee, that reformation would have to be done in a court of equity, outside the scope of the contract on file with us as a rate schedule. Thus, our order of April 3, 1968, expressly rejecting Jupiter's offset argument, provided, *inter alia*, that (Ordering paragraph (C)):

> Jupiter is, and since August 11, 1965, has been obligated to pay Phillips-Kerr-McGee the latters' prescribed certificate rate of 18.5¢ per Mcf under Phillips' FPC Gas Rate Schedule No. 329 and Kerr-McGee's Gas Rate Schedule No. 56, respectively.

On May 24, 1968, the Commission clarified its April 3 order, and denied Jupiter's application for rehearing, expressly holding that to the extent that Jupiter might be found in court proceedings to be due some amount for the non-jurisdictional services performed, those amounts might not be commingled or confused in Jupiter's accounts with the amounts due for jurisdictional services.

[3871]

Phillips-Kerr-McGee have now renewed a motion for enforcement of the Commission's order, initially made before Jupiter had filed its petition for review of our order of April 3, 1968, in the United States Court of Appeals for the District of Columbia Circuit. It now

appears that, although Jupiter has not sought a stay of our order of April 3, 1968, it has continued to act in violation of that order by tendering only 17.1¢ per Mcf to Phillips-Kerr-McGee. By their renewal of motion for enforcement, Phillips-Kerr-McGee assert that Jupiter, as of July 31, 1968, had unlawfully withheld $646,115.61 since the 1966 settlement, and continues to collect the "spread" found unjust and unreasonable in 1966.

Jupiter does not deny that it has continued to collect the spread found to be improper, but continues to assert that it does so without violation of this Commission's orders. Jupiter carefully refrains from discussing in its pleadings in response to the renewed motion for enforcement the language and obvious purport of the Commission's orders of April 3, 1968, and May 24, 1968. While Jupiter may disagree with these orders and has, in fact, filed a petition for review thereof, it may not, in the absence of a stay (which it has not even sought from this Commission or the Court of Appeals) ignore them. A more open course of conduct in violation of our orders than that which is presently being followed can hardly be imagined.

In the light of the history of this proceeding it seems plain that no more explicit order could be directed to Jupiter than those previously addressed to it. We have therefore concluded that the only satisfactory method by which the integrity of our order can be maintained, pending the resolution of the proceeding to review our order of April 3, 1968, is an order directed to Tennessee as well as Jupiter.

While we could, in theory, seek enforcement by mandamus in an appropriate United States District Court,

such a procedure would not be likely to protect the integrity of our order or materially assist Phillips-Kerr-McGee. For the same issues which Jupiter raises in the present review proceedings would be raised in the enforcement proceeding. And since the venue [3872] provision of the Act could bar the bringing of such a suit in the District Court for the District of Columbia, an unseemly conflict of jurisdiction among courts might well result. We conclude that no desirable purpose would be likely to be served by accepting the suggestion of Phillips-Kerr-McGee that we seek a writ of mandamus in the district court.

The alternative motion of Phillips-Kerr-McGee, however, is far more likely to be effective, if adopted. For, because Tennessee pays Jupiter, which pays Phillips-Kerr-McGee for the gas in question, it is a relatively simple matter to temporarily adjust these relationships to ensure that Jupiter does not profit by delay and possibly jeopardize the final recovery of the monies involved by the financial difficulties it has often asserted. Thus we shall order Tennessee to pay directly to Phillips-Kerr-McGee the amount which Jupiter would otherwise owe them for all deliveries of gas after the date of this order.

The amount which Phillips-Kerr-McGee is entitled to receive, however, has been altered by the proceedings in Docket Nos. AR61-2 and the issuance of Opinion No. 546, issued September 25, 1968, which determined the just and reasonable rates for natural gas produced in the South Louisiana area. Since Phillips-Kerr-McGee contracted to sell this Rollover Field gas to Marine Gathering Company, Jupiter's predecessor, well before 1961, the base price for the gas in question, sold for delivery to Ten-

nessee, is, under Opinion No. 546, 17.0¢ per Mcf,[3] the price applicable to gas sold under contracts dated before January 1, 1961. Assuming that Opinion 546 is affirmed on rehearing and in any judicial review, it would be this 17.0¢ price which would be applicable subsequent to September 25, 1968.

[3873]

Tennessee's obligation to Jupiter is likewise dependent upon the effect of Opinion No. 546 on the Phillips-Kerr-McGee rates. For our original approval of a 19.5¢ per Mcf price for Jupiter's sale to Tennessee[4] was predicated upon the 18.5¢ price which had been set for Phillips-Kerr-McGee's sale to Jupiter and the consequent 1¢ per Mcf price spread for Jupiter. The Jupiter settlement, 35 FPC 1091, rehearing denied, 36 FPC 495, provided for a "reduced transportation rate of 1¢ per Mcf * * *," 35 FPC 1091, 1094, Ordering Clause A. And Jupiter's previous agreement to flow through or refund to Tennessee any rate reductions or refunds it received from Phillips-Kerr-McGee resulting from a reduction in price of those sales was expressly noted by the Commission in approving the

[3] It is not clear whether the BTU adjustment prescribed in Opinion 546 is applicable here. The gas which Jupiter buys from Phillips-Kerr-McGee for redelivery to Tennessee is that gas which Tennessee receives, which has been treated to remove condensates and liquefiable hydrocarbons.

[4] The change in price was filed by Jupiter on July 13, 1966, as Supplement No. 6 to its FPC Gas Rate Schedule No. 8, and was accepted for filing by the Commission on August 16, 1966.

settlement. See 35 FPC 1091, 1094, footnote 8.[5] Thus, to the extent that Jupiter's price to Phillips-Kerr-McGee for the gas to be sold to Tennessee is reduced from 18.5¢ per Mcf to 17.0¢, together with adjustments possible under Opinion 546, Tennessee's obligation to Jupiter is commensurately reduced.

Because the proceedings in Docket Nos. AR61-2 *et al.* are presently before us on petitions for rehearing, and because the filing of new rate schedules has been postponed pending rehearing, it is not now clear just what the new proper rate for Phillips-Kerr-McGee will be or when Phillips-Kerr-McGee will be required to collect any lower just and reasonable rate. We shall accordingly, provide that Tennessee will pay 18.5¢ per Mcf to Phillips-Kerr-McGee for gas delivered after the date of this order, such payments to be reduced, by the appropriate amount, as of the date Phillips-Kerr-McGee would otherwise be required to collect a lesser sum per Mcf as a result of further proceedings in AR61-2. We shall also provide that, so long as Tennessee makes this payment, Jupiter shall be relieved thereof. Thus Jupiter will suffer no financial detriment.

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[5] In its offer of settlement, Jupiter had undertaken to reduce its rate to Tennessee only in the event and to the extent that the Commission validly authorized a price for gas sold by Phillips-Kerr-McGee to Jupiter at a level different from 18.5 cents per Mcf. To the extent that this condition might have precluded the Commission from future investigation of Jupiter's rates, it was considered undesirable, and was disapproved. This left Jupiter's agreement to flow through to Tennessee refunds or rate reductions it received from Phillips-Kerr-McGee, *supra*, and the approval of its settlement transportation rate of 1¢ per Mcf.

Phillips-Kerr-McGee has also moved for an order requiring Jupiter presently to pay the $646,115.61 which Jupiter appears to owe through July 31, 1968, as a result of failing to comply with the settlement order of June 28, 1966, together with accretions to that sum since July 31, 1968.[6] There is no doubt that Jupiter does owe a substantial additional amount to Phillips-Kerr-McGee[7] under the outstanding Commission orders and to the extent a further order by us is sought directing that Jupiter make the payments to Phillips-Kerr-McGee we have previously held they are obligated to make, we shall so order. While Jupiter has at various times throughout the course of this proceeding asserted its financial difficulties, we are not in a position to determine either Jupiter's ability to make these payments now or the need of Phillips-Kerr-McGee for protection against possible insolvency on the part of Jupiter.[8] Since, however, Jupiter's appeal from our earlier orders to the same effect is pending in the Court of Appeals we see no need to take administrative action here to protect either Jupiter or Phillips-Kerr-McGee. If Jupiter believes this further order impairs its financial status or that continued failure to comply with it and the order of April 3, 1968, in any other sense puts it in jeopardy, it is free to seek the stay in the Court of Appeals it has so

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[6] It would appear, from a comparison of the motion and renewal of motion of Phillips-Kerr-McGee, that the amounts which Jupiter has unlawfully withheld have approximated $25,000.00 per month.

[7] Any refunds which might otherwise be due Jupiter from Phillips-Kerr-McGee as a result of Docket No. AR61-2 *et al.* will be directed to be reported to this Commission and held by Phillips-Kerr-McGee pending further order.

[8] See, however, the information cited in Moody's Industrials.

long avoided. **[3875]** If Phillips-Kerr-McGee believes that the possibility of the eventual recovery of what Jupiter has been held to owe them is in jeopardy, they can seek bond from Jupiter in the Court of Appeals.[9]

Because the earlier order of this Commission is presently before the United States Court of Appeals for the District of Columbia Circuit, we are directing our Solicitor to advise that Court at once of the issuance of this order. If Jupiter were to obtain from that court a stay of our April 3, 1968, order, we would, of course, be prepared to stay this order as well upon notification that the stay had been entered. But unless that original order is stayed, we believe the violation here to be so flagrant as to make this somewhat unusual action necessary and appropriate to carry out the provisions of the Act. We shall make this order effective 15 days after issuance, except that, if within that time Jupiter applies to the Court of Appeals for a stay of the order of April 3, 1968, we shall direct Tennessee to retain all payments otherwise due to Jupiter pending the result of the stay application.

Accordingly, the Commission finds:

(1) The Jupiter Corporation has flouted the terms of the Commission's order of April 3, 1968.

(2) As a result of that violation, Phillips-Kerr-McGee is deprived of the payment of the rate which is on file and which Jupiter is required to pay.

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[9] To the extent that the issue between Jupiter and Phillips-Kerr-McGee may resolve itself into who has or is entitled to the present use of the money involved we see no need for our intervention into the controversy.

(3) It is necessary and appropriate to carry out the provisions of the Natural Gas Act to enter the following orders.

The Commission orders:

(A) Tennessee Gas Pipeline Company, a Division of Tenneco, Inc., is hereby ordered to pay directly to Phillips-Kerr-McGee, on the account of the Jupiter Corporation, for gas received after the date of this order, 18.5¢ per Mcf for the gas delivered to Tennessee Gas Pipeline Company, such payments to be reduced by the appropriate amount as of the date Phillips-Kerr-McGee is required to collect a lesser sum per Mcf as a result of the proceedings in Docket No. AR61-2.

(B) Tennessee Gas Pipeline Company is relieved of payment to Jupiter for gas for which payment is made in accordance with paragraph (A) on Jupiter's account.

(C) The Jupiter Corporation is relieved of payment to Phillips-Kerr-McGee for gas for which payment in accordance with paragraph (A) is made by Tennessee Gas Pipeline Company.

(D) To the extent that Jupiter's payments, since June 28, 1966, to Phillips-Kerr-McGee have been on some other basis than the 18.5¢ per Mcf ordered by this Commission. Jupiter shall pay to Phillips-Kerr-McGee the amount of the shortage.

(E) If refunds are found to be due the Jupiter Corporation by Phillips-Kerr-McGee, then they shall be held pending order of the Commission by Phillips-Kerr-McGee and a prompt report of the amounts due and circum-

stances of their collection shall be furnished the Commission.

(F) This order shall become effective fifteen days after the date of issuance, except that, if the Jupiter Corporation, before that effective date, files an application for a stay **[3877]** of the order of April 3, 1968, in the United States Court of Appeals for the District of Columbia Circuit, the Tennessee Gas Company is directed to hold all payments presently due or to be due the Jupiter Corporation pending the result of that application.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

(SEAL)

Gordon M. Grant,
Secretary.

[3878]

THE JUPITER CORPORATION UNION OIL COMPANY OF CALIFORNIA PHILLIPS PETROLEUM COMPANY and KERR-McGEE CORPORATION	Docket Nos. RI63-212 G-16790 RI68-111

(Issued December 13, 1968)

CARVER, Commissioner, *dissenting*:

In their pleading filed with the Federal Power Commission on October 16, 1968, denominated "Renewal of Motion," Phillips Petroleum Company and Kerr-McGee Corporation, Movants, ask for a new and different form of relief, stating that:

> it is necessary and appropriate for the Commission to issue, and the Commission is requested to issue, an order (1) directing Tennessee to pay directly to movants their filed rate and to Jupiter only the difference between this rate and Tennessee's purchase price, . . . (p. 11)

Tennessee[1] is not a captioned party in this proceeding. While generally supporting Phillips and Kerr-McGee in their controversy with Jupiter, Tennessee opposes the above-quoted new request in a response filed on October 25, 1968, arguing that it "goes beyond the bounds of procedural relief" and that it "would create new contractual relationships between Tennessee and movants" beyond the Commission's authority under the Natural Gas Act. (pp. 1-2)

Tennessee makes several supporting arguments, two of which I consider to be central and controlling. Since the Commission has adopted the theory of relief asserted in

[1] Tennessee Gas Pipeline Company, a Division of Tenneco Inc.

the supplemental pleading of October 16, 1968, my agreement with the soundness of Tennessee's position requires me to dissent.

The first argument is that an order upon Tennessee to pay funds due under Jupiter's tariff directly to Phillips and Kerr-McGee, is tantamount to an order to deviate from a filed rate. Phillips and Kerr-McGee, in their brief supporting their request for the Commission to institute enforcement proceedings under Section 20 of the Natural [3879] Gas Act, cite many of the cases which support the integrity of the filed rate, particularly *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951)

> [Petitioner] can claim no rate as a legal right that is other than the filed rate whether fixed or merely accepted by the Commission, *and not even a court can authorize commerce in the commodity on other terms.* (at p. 251; emphasis added.)

The other ground is that the order requested involves an exercise of judicial power not granted to the Commission, in effect constituting "attachment or garnishment of Jupiters' potential assets in the hands of Tennessee."

I do not believe that the characterization of the relief as "judicial" is determinative. However, the equivalence of the issued order to an order of attachment or garnishment focuses attention on the fundamental concept underlying Tennessee's objection, and my ground for dissent, which is that the Natural Gas Act, the sole source of the Commission's authority, does not encompass this kind of relief.

"Garnishment is generally considered to be a purely statutory proceeding, unknown to the common law." 38 C.J.S. *Garnishment* §1b. If even a court must seek author-

ity in affirmative legislation to subject property in the hands of third persons owed to a defendant to the satisfaction of a plaintiff's claim, it would seem that an administrative agency would be doubly constrained, and inhibited from reading such relief into the generality of Section 16 or its equivalent.

This is particularly true where, as with the Natural Gas Act, other provisions of the statute specify with particularity the method of enforcement of the Commission's orders, as against recalcitrant certificate holders. Section 20(b) is the basis of the relief Phillips and Kerr-McGee have sought, and it certainly seems on its face to be appropriate:

> Upon application of the Commission the district courts of the United States and the United States [3880] courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder. Section 20(b), Natural Gas Act; 15 U.S.C. §717s.

The argument in the Commissions' opinion that the statutory procedure "would not be likely to protect the integrity of our order or materially assist Phillips-Kerr-McGee because the same issues are before the United States Court of Appeals under Section 19(c), and because there would result "an unseemly conflict of jurisdiction among courts" seems to me to be officious. Certainly it cannot be an argument to abandon the specific provisions of a statute in favor of contrived relief inferred from Section 16.

John A. Carver, Jr., Commissioner
/s/ John A. Carver, Jr.

* * * * *

CAPTION

[3903]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Carl E. Bagge, and John A. Carver, Jr.

THE JUPITER CORPORATION UNION OIL COMPANY OF CALIFORNIA PHILLIPS PETROLEUM COMPANY and KERR-MCGEE CORPORATION	Docket Nos. RI63-212 G-16790 RI68-111

ORDER DENYING REQUEST FOR STAY AND PETITION FOR REHEARING AND CLARIFYING PREVIOUS ORDER

(Issued January 22, 1969)

On December 13, 1968, the Commission issued an order on a motion by Phillips-Kerr-McGee to enforce the several earlier orders by the Commission in this proceeding. That order directed the Tennessee Gas Pipeline Company, while continuing to pay the Jupiter Corporation the 1¢ per Mcf to which it is entitled under the Commission's order of June 28, 1966, as clarified by the orders of April 3, 1968 and May 24, 1968, to pay directly to Phillips-Kerr-McGee the 18.5¢ per Mcf to which it was entitled as a result of those orders and of Opinion No. 470, 34 FPC 486. When the price to which Phillips-Kerr-McGee is entitled is reduced as a result of the proceedings in Docket No. AR61-2, Tennessee was directed to reduce the amount it paid directly to Phillips-Kerr-McGee appropriately, while continuing to pay 1¢ per Mcf directly to Jupiter. Jupiter was also directed to pay to Phillips-Kerr-McGee the amounts

which it owed under the above orders.[1] The order of December 13 **[3904]** specifically stated that it would be stayed if the order of April 3, 1968, which is under review in the United States Court of Appeals of the District of Columbia Circuit were stayed. We also made provision for Tennessee to hold all moneys otherwise to be paid with respect to these transactions pending resolution of any such stay proceeding, if such a proceeding were filed within fifteen days.

On December 23, 1968, Jupiter filed a petition for rehearing and request for stay of portions of the December 13, 1968, order. Jupiter asserts that:

(1) the motions of Phillips-Kerr-McGee to enforce were automatically denied by operation of Section 1.12 (e) of the Commission's Rules of Practice and Procedure and could not, therefor, be granted;

(2) because a portion of the services which it performs for Phillips-Kerr-McGee are non-jurisdictional, the Commission may not or should not control the "spread" on the contracts which cover both services;

(3) the "tone" of that order was unnecessarily severe;

(4) the order exceeds the Commission's legal authority; and

(5) the Commission had no power to issue the order since it "modified" the order of April 3, 1968, as to which a review proceeding was pending.

Jupiter requests the grant of rehearing of the December 13, 1968, order and that it be set aside or amended to change the statement and implication that Jupiter has

[1] An amount in excess of $646,115.61.

willfully violated the Commission's orders. Alternatively, Jupiter requests that [3905] the Commission stay the subject order pending review of the principles involved in the review proceeding before the United States Court of Appeals for the District of Columbia Circuit. If the above requests are not granted, Jupiter requests a temporary stay pending action by the Court of Appeals on a motion by Jupiter for a stay, and that ordering paragraph (F) of the December 13, 1968, order, which directs Tennessee to hold all payments with respect to the gas here involved pending resolution of a stay motion timely presented in the Court of Appeals, be set aside.

We are not persuaded that our order should be altered. Plainly, Rule 1.12(e) does not automatically deny motions of the type here made by Phillips-Kerr-McGee simply by the passage of 30 days. That section, by its terms, refers only to motions made during hearings, not after the entire matter has been submitted to the Commission.

Jupiter's argument as to the Commission's power to control the "spread" charged under its contract is the same argument which Jupiter has made, unsuccessfully, several times before. We need go no further than to point out, again, that the contract between Jupiter and Phillips-Kerr-McGee is on file with this Commission as the contractual support for Phillips-Kerr-McGee's rate schedule covering the sale of natural gas to Jupiter and is subject to our jurisdiction as such. Jupiter may not evade its obligation to pay the filed rate by offsetting other contract claims against such jurisdictional rates.

Nor do we believe that the tone of our December 13, 1968, order was excessively harsh. Even if Jupiter could claim that earlier orders were ambiguous, there could be

no doubt about its obligations after our declaratory order of April 3, 1968.[2] No amendment to the "tone" of our order is appropriate.

[3906]

We do not agree that this Commission is limited to seeking mandatory injunctions in court to enforce its orders. We believe that Section 16 of the Natural Gas Act gives us authority to fashion a remedy consistent with the spirit of the Act when, as here, the necessary parties are all natural-gas companies within our jurisdiction and parties to the proceeding, and the remedy is necessary or appropriate to carry out the provisions of the Act. To the extent Jupiter may disagree review remains available in the courts from our order.

The allegation that we have modified an order under review in the courts is equally baseless. The order of April 3, 1968, is in no way modified. The order of December 13, 1968, merely enforced the certificate order of August 11, 1965 and the settlement order of June 28, 1966, as clarified by the order of April 3, 1968. No conclusions reached by the April 3 order were modified, nor were any responsibilities imposed thereby varied. To the extent that the order of December 13, 1968, specifies a different method of enforcing these obligations than contemplated in the June 28, 1966 settlement order or the order of August 11, 1965 (which are not subject to review) in the face of the continued unwillingness of Jupiter to comply therewith, such procedures were expressly made subject to suspension should Jupiter, as it has in fact done, seek a stay of our earlier action in the Court of Appeals for the District of Columbia. Certainly we have not compromised the juris-

[2] And the order on rehearing of May 24, 1968.

diction of the court by providing that, pending its resolution of the stay request, Tennessee hold further payments of money due under the transactions in issue.

We do not believe that any basis exists for us to grant a stay of our order of December 13, 1968. Jupiter may proceed with the stay motion it has now filed in the Court of Appeals, as the order of December 13, 1968, envisioned, and is free in addition to seek a stay of that order.

[3907]

Nothing before us indicates that the effectuation of the December 13, 1968, order during the period necessary for the court to consider such stay motion or motions will irreparably injure Jupiter or any other party to this proceeding.

We are advised by our Solicitor that the motion to stay filed by Jupiter in the United States Court of Appeals for the District of Columbia Circuit was not actually filed within fifteen days of our December 13 order although a copy thereof was timely received by us. In the circumstances, since Jupiter would appear to have made a good faith attempt to file timely, we elect to treat the motion as timely filed for that purpose, and direct Tennessee to hold all payments presently due or to be due the Jupiter Corporation pending the result of the application for a stay, in accordance with ordering paragraph (F) of our December 31, 1968, order.

On January 10, 1969, Tennessee Gas Pipeline Company filed an application for clarification of our order of December 13, 1968. Tennessee asserts a need for clarification with respect to:

(a) the amounts due Jupiter,

(b) the procedure for the reduction in rates as a result of the proceedings in AR61-2,

(c) the date upon which the procedure specified in the order of December 13, 1968 becomes applicable, and

(d) the arrangements to be operative between Phillips-Kerr-McGee, Tennessee and Jupiter.

Inasmuch as we have elected to treat Jupiter's filing of a stay motion in the Court of Appeals as made within the time specified by our order, only question (c) above presently is at issue. This result follows because our order provided that, if Jupiter timely filed a motion for a stay of the orders of April 3, 1968, and May 24, 1968, Tennessee would be required to hold all moneys due for the gas here involved pending the **[3908]** resolution of the stay proceeding. Nonetheless, since the stay proceeding should be resolved in the near future, Tennessee is entitled to a clarification of its doubts on all issues.

The December 13, 1968, order directed Tennessee to divert 18.5 cents per Mcf of the 19.5 cents per Mcf[3] which would otherwise be paid Jupiter to Phillips-Kerr-McGee, on Jupiter's account. That left 1 cent per Mcf to be paid directly to Jupiter, if and when the Court of Appeals denies Jupiter's stay petition, the amount to which Jupiter is entitled under its settlement and the intervening orders. We shall make this clear by order.

Tennessee expresses doubt as to the proper procedure to be followed in passing on the rate reduction to be made as a result of the proceedings in Docket No. AR61-2, noting that there is no separate ordering clause directing Jupiter to file revised rates to pass on the reduction. As

[3] Both figures subject to change as a result of the proceedings in Docket No. AR61-2.

we have noted in our December 13 order (Mimeo p. 6), however, Jupiter is under order to flow through to Tennessee any rate reductions or refunds it receives from Phillips-Kerr-McGee resulting from a reduction in price of the gas here at issue. Ordering paragraph A of the December 13, 1968, order provides that Tennessee shall reduce its payments on the date Phillips-Kerr-McGee's price is reduced. Jupiter has not contested this portion of our order. Nonetheless, although no further express order requiring Jupiter to make the filing it is obligated to make should be necessary, we shall order the filing in question.

Tennessee has questioned the procedure for establishing the BTU adjustment under Opinion 54. Ordinarily, the quality statement required by that order would be executed by Phillips-Kerr-McGee and Jupiter. Because of the special circumstances of this case, however, we shall provide in Docket No. AR61-2 that the quality statement applicable to the gas resold to Tennessee be executed by Phillips-Kerr-McGee, Jupiter and Tennessee.

The procedures established by our order of December 13, 1968, are applicable to all gas received after the date of the order. Jupiter was granted a fifteen day period within which to apply to the court of appeals for a stay, however, **[3909]** and, since alternative procedures were to be applied dependent upon Jupiter's decision whether to seek a stay, neither procedure was actually to be applied until that date had passed. The order, however, remains applicable to all gas delivered after December 13, 1968.

The Commission, of course, has not directed Tennessee to buy gas directly from Phillips-Kerr-McGee. Rather, we have temporarily adopted the procedures set out in our December 13, 1968, order to assure that Jupiter com-

plies with its obligations to the producers. The existing contract regulations, insofar as not inconsistent with our orders,[4] remain controlling. As to possible overcharges which may result from misbillings, these may be recovered by Tennessee from Jupiter or Phillips-Kerr-McGee dependent on which received the overcharge. And, of course, Jupiter, or Phillips-Kerr-McGee may similarly recover undercharges from Tennessee. So that there may be no doubt about this matter, we shall clarify it by order.

The Commission finds:

The assignments of error and grounds for rehearing and stay as set forth in the petition for rehearing and motion for stay filed by Jupiter present no facts or legal principles which would warrant any change, modification or stay of our order of December 13, 1968.

[3910]

The Commission orders:

(A) The petition for rehearing and motion for stay filed on December 23, 1968, by the Jupiter Corporation are denied.

(B) The Tennessee Gas Pipeline Company, a Division of Tenneco, Inc., is directed to hold all payments presently due or to be due the Jupiter Corporation pending

[4] Tennessee also raises a question as to the applicability of the term of its contract with Jupiter which provides that Jupiter may cease deliveries of gas if not paid. Since the money paid by Tennessee to Phillips-Kerr-McGee is paid on Jupiter's account Jupiter is being paid the contract amount. But even were this not so, the contract provision cited is necessarily subordinate to the provisions of Section 7(b) of the Natural Gas Act, which prohibits abandonment of service without the approval of this Commission.

the result of the stay application filed by the Jupiter Corporation in the United States Court of Appeals for the District of Columbia Circuit.

(C) The Tennessee Gas Pipeline Company, a Division of Tenneco, Inc., is directed, if the stay application filed by the Jupiter Corporation in the United States Court of Appeals for the District of Columbia Circuit is denied, to pay 1.0¢ per Mcf for gas received after December 13, 1968, to the Jupiter Corporation.

(D) The Jupiter Corporation is directed to file a reduction of its rates to the Tennessee Gas Pipeline Company within ten days following the filing by Phillips-Kerr-McGee of a reduction of rates to Jupiter as a result of the proceedings in Docket No. AR61-2, the filed reduction to be in the same amount and for the same period as that which Phillips-Kerr-McGee files.

(E) Any inadvertent overcharges or undercharges which may result in noncompliance with the terms of ordering paragraph A of the Commission's December 13, 1968, order and ordering paragraph C of this order shall be paid by the Jupiter Corporation, Phillips-Kerr-McGee or the Tennessee Gas Company, a Division of Tenneco, Inc., as their interests may appear, to the party entitled to the additional money under those orders, within 30 days after final determination thereof.

By the Commission: Commissioner Carver adheres to the views set forth in his statement accompanying the order issued December 13, 1968, in Dockets Nos. RI63-212, *et al.*

Gordon M. Grant,
Secretary.

[SEAL]

United States Court of Appeals

For The District Of Columbia Circuit

No. 22,154

THE JUPITER CORPORATION, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent
PHILLIPS PETROLEUM CO. and KERR-McGEE CORP., TENNESSEE GAS PIPELINE CO., LONG ISLAND LIGHTING CO., Intervenors

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No. 22,442

UNION OIL COMPANY OF CALIFORNIA, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent
TENNESSEE GAS PIPELINE CO., THE JUPITER CORPORATION, PHILLIPS PETROLEUM CO., and KERR-McGEE CORP., LONG ISLAND LIGHTING CO., Intervenors

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No. 22,693

THE JUPITER CORPORATION, Petitioner

v.

FEDERAL POWER COMMISSION, Respondent

Petitions for Review of Orders of the Federal Power Commission

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Decided October 10, 1969

Mr. William W. Brackett, with whom *Mr. Donald W. Glaves* was on the brief, for petitioner in Nos. 22,154 and 22,693.

Messrs. John C. Snodgrass and *John L. Murchison, Jr.,* for petitioner in No. 22,442.

Mr. David F. Storer, Attorney, Federal Power Commission, with whom *Messrs. Richard A. Solomon,* General Counsel, *Peter H. Schiff,* Solicitor and *Robert C. McDiarmid,* Assistant to the General Counsel, Federal Power Commission, were on the brief, for respondent.

Mr. Howard C. Westwood, with whom *Messrs. Herbert Dym, Paul S. Hoff* and *John R. Rebman* were on the brief, for intervenors, Phillips Petroleum Co. and Kerr-McGee Corp. in Nos. 22,154 and 22,442.

Mr. Melvin Richter, with whom *Mr. Jack Werner* was on the brief for intervenor, Tennessee Gas Pipeline Co. in Nos. 22,154 and 22,442.

Mr. Morton L. Simons entered an appearance for intervenor, Long Island Lighting Company in Nos. 22,154 and 22,442.

Before FAHY, *Senior Circuit Judge,* BURGER* and TAMM, *Circuit Judges.*

TAMM, *Circuit Judge*: Petitioners, the Jupiter Corporation and Union Oil Company of California, seek review of declaratory orders of the Federal Power Commission regarding certain rates to be charged by Jupiter, owner and operator of an underwater pipeline system offshore

* Circuit Judge Burger (now Chief Justice) did not participate in the disposition of this case.

of Louisiana in the "Rollover Field." Petitioner Union and the Phillips Petroleum Company and Kerr-McGee Corporation (PKM), joint venturers and intervenors in these suits, are producers of gas in the Rollover Field who transport it to shore through Jupiter's pipeline. Jupiter receives natural gas and liquid condensate[1] produced by these companies for transport to shore, where the condensate is separated out and the natural gas is delivered to the pipeline purchaser, Tennessee Gas Pipeline Company, also an intervenor in these cases.

In 1962, the Commission instituted an investigation to determine the just and reasonable rates to be charged for Jupiter's transportation of gas from the producers to Tennessee. *Jupiter Corp.*, 28 F.P.C. 942 (1962). As a result of this proceeding and the ensuing 1966 settlement, detailed below, Jupiter's rates were substantially reduced. Sometime thereafter, Jupiter took the position that it was entitled under its contracts with the producers to charge the producers for transportation and processing services related to the liquid condensates in an amount equal to the reductions in its rates chargeable to Tennessee. The producers disagreed.

The resulting controversy does not yield to easy summary. Jupiter sued PKM and Union in state and federal courts in Illinois for amounts allegedly due it under its theory of the contracts. Because of the different

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[1] Some simple definitions are in order. The natural gas stream is a mixture of hydrocarbons, all of which can be liquefied at differing temperatures and pressures. Those classified as "condensates" condense to a liquid more easily and can be removed by simple mechanical separation. "Liquefiable hydrocarbons" are lighter hydrocarbons which must be removed by more sophisticated processing operations. Both types will be referred to as "condensates" in this opinion.

formats of Jupiter's transactions with the producers, Jupiter's claimed rights have led it (1) to withhold from PKM sums which PKM asserts are due it under the lawful filed rate for its gas and (2) to charge Union more than Union claims it owes under its contract for Jupiter's services. Because Union claims the right to pass all of Jupiter's charges on to Tennessee, Tennessee has been charged amounts for transportation in excess of the settlement rate. PKM and Tennessee therefore sought action from the Commission to enforce their rights under the 1966 settlement. The Commission responded with the declaratory orders here under review, rejecting the claims of Jupiter and Union.

The issues presented on these petitions for review are simpler than their setting. Jupiter contests the Commission's orders on the ground that the orders compel an unlawful increase in the price it is contractually bound to pay PKM for gas. Union petitions for review of the orders in an effort to establish a right to recover from Tennessee any and all of Jupiter's charges to it regardless of whether the charges are attributable to transportation of gas to Tennessee. Other issues in the cases are the Commission's assertion of jurisdiction to regulate Jupiter's rates for transportation of liquid condensates, as opposed to the gas portion of the gas stream, and two subsidiary procedural questions. We have concluded that a decision on the jurisdictional question concerning the liquid condensates is unnecessary in the present posture of these cases. The orders of the Commission are otherwise affirmed in their entirety.

I. Background of the Dispute

A. *Jupiter-Phillips-Kerr-McGee (PKM) Operation*

Pursuant to 1953 contracts, PKM sells natural gas to Jupiter which resells it to Tennessee under another contract. The liquid condensate portion of the gas stream is separated out by Jupiter and redelivered to PKM which sells it privately. Jupiter's payment for its service, therefore, is a "spread," amounting to the difference between what it pays PKM and what it collects from Tennessee. Until the rate investigation and settlement, this "spread" amounted to an average of 2.4 cents per Mcf (1,000 cubic feet) of gas.

B. *Jupiter-Union Operation*

Union retains the ownership of the gas transported by Jupiter to Tennessee, after removal of the condensates. Union's payment to Jupiter for its services was fixed by a 1957 "Hydrocarbon Gathering and Separating Agreement" providing for payment of 4 cents per Mcf of gas for the first 62,000 Mcf of gas handled daily, and 3 cents per Mcf for additional amounts. This charge based on volume averaged 3.4 cents per Mcf.

Union's price to Tennessee was determined in a 1962 settlement of the price then charged by Union's predecessor, the Pure Oil Company. *Pure Oil Co.*, 28 F.P.C. 889 (1962). In lieu of a single rate to Tennessee previously set by contract, the settlement provided for a composite price consisting of 16.75 cents per Mcf, plus reimbursement by Tennessee of the amounts Union (then Pure) paid Jupiter for transportation of the gas.

C. *Rate Settlement*

In December 1962, the Commission began an investigation of the reasonableness of Jupiter's rates under section 5(a) of the Natural Gas Act, 15 U.S.C. § 717d (1964); *Jupiter Corp.*, 28 F.P.C. 942 (1962). This investigation was finally terminated in the examiner's opinion and orders issued January 5, 1966. *Jupiter Corp.*, 35 F.P.C. 1091, 1095 (1966). The examiner found that .632 cent per Mcf was a just and reasonable rate for Jupiter's transportation services to PKM and Union.

Jupiter then proposed a settlement under which it would receive 1.25 cents per Mcf for transport of gas to Tennessee. Jupiter further stated that, since its contracts did not provide separate charges for its services regarding the liquid condensates, an equitable settlement required reformation of its contracts or Commission permission for Jupiter to retain charges for such services. This offer was subsequently amended to propose a 1 cent charge for the gas transportation service, still reserving Jupiter's right to collect compensation for the other services from the producers.

The Commission accepted the settlement offer of a 1 cent charge. The settlement order contains the following statement with reference to Jupiter's claim for additional compensation from the producers:

> Jupiter's reservation of claimed rights with respect to the collection from Union and Phillips-Kerr McGee of compensation for transporting, separating or storing those producers' condensates and liquefiable hydrocarbons . . . does not present any issue to be determined at this time. Any contractual arrangements Jupiter makes with the producers for those

> services will be acted upon if and when they are appropriately submitted to this Commission.

(35 F.P.C. at 1094.) Union and PKM objected to the settlement order in the belief that the above reference to the contract reformation issue implied that Jupiter had some rights to compensation for other services. This the producers denied. The Commission denied rehearing of the settlement order with the comment that the quoted statement neither implied that further arrangements were subject to negotiation, nor required that negotiations be held. *Jupiter Corp.*, 36 F.P.C. 495 (1966). No one petitioned for judicial review of the order approving the settlement. On July 13, 1966, Jupiter forwarded new rate schedules in compliance with the order.

II. The Jupiter-PKM Dispute

Shortly before the Jupiter rate settlement, the Commission had entered orders setting PKM's price to Jupiter at no more than 18.5 cents per Mcf and Jupiter's price to Tennessee at no more than 20.9 cents. *Phillips Petroleum Co.*, 34 F.P.C. 486 (1965) (hereinafter "Opinion 470"). Thus the "spread" retained by Jupiter was 2.4 cents. The effect of the 1966 settlement, reducing Jupiter's transportation charge to 1 cent, was to lower Jupiter's resale price to Tennessee by 1.4 cents to 19.5 cents.

From June 1966 through May 1967, Jupiter collected 19.5 cents from Tennessee and paid 18.5 cents to PKM, pocketing 1 cent. Since May 1967, however, Jupiter has claimed that under its contract with PKM, it may reduce its payments to PKM by the same amount that its payments from Tennessee are reduced, namely, by 1.4 cents or from 18.5 to 17.1 cents. In August, 1967, Jupiter sued PKM in the Circuit Court of Cook County, Illinois,

on this theory of the contract to recover the 1.4 cents that it had paid PKM from June, 1966 to May, 1967. Since that time, Jupiter has tendered only 17.1 cents to PKM, consistent with its position that 17.1 cents is the contract price for gas.

PKM then filed a motion with the Commission requesting it to enforce payment at the 18.5 cent rate, as provided in the settlement order. On April 3, 1968, the Commission issued the declaratory order under review, *Jupiter Corp.*, 39 F.P.C. 417 (1968), with the following findings regarding Jupiter's obligations in the PKM transaction:

(1) Jupiter is required to pay PKM the certificate rate of 18.5 cents per Mcf, and to charge Tennessee 19.5 cents per Mcf.

(2) Compensation for services other than transportation of that part of the gas stream delivered to Tennessee is a separate contractual issue for the courts, where any judicial remedy "may well be a matter of equity rather than law." (39 F.P.C. at 421.) The amounts at issue cannot be set off against the 18.5 cent certificate rate.

(3) The Commission would require Jupiter to obtain a certificate from the Commission for any rates to be charged PKM for the transportation portion of the liquid condensate service in the event that Jupiter recovered some payment for this service in its state court suit.

Jupiter sought rehearing of this order, which was denied in an order and opinion of May 24, 1968, *Jupiter Corp.*, 39 F.P.C. 854 (1968). Because Jupiter's petition for rehearing expressed doubt, not to say disbelief, that

the April 3 order required it to pay the 18.5 cent rate without set-off of amounts allegedly due for condensate services, the Commission attempted to dispel any confusion with the statement that "[t]o the extent that Jupiter may be found in its present court proceedings to be due some amount for the nonjurisdictional services performed, these amounts may not be commingled or confused with the amounts due for jurisdictional services in Jupiter's accounts" (39 F.P.C. at 855).

On July 1, 1968, PKM filed a motion with the Commission complaining that Jupiter continued to tender only 17.1 cents and requesting an enforcement order. This motion was renewed on October 16, 1968. In response to these motions, the Commission issued an order on December 13, 1968, stating that the only way to maintain the integrity of its April 3 and May 24 orders, pending this court's review, was to direct Tennessee to pay 18.5 cents directly to PKM (for the account of Jupiter) and 1 cent directly to Jupiter. *Jupiter Corp.*, 40 F.P.C. 1455 (1968). Jupiter was also directed to pay over to PKM any amounts short of the 18.5 cent rate withheld since the 1966 settlement.[2] Jupiter sought a rehearing of the enforcement order, which was denied on January 22, 1969. *Jupiter Corp.*, 41 F.P.C. 72 (1969). The Commission had stated that its December 13 order would be stayed if this court granted a stay of the April 3 order pending judicial review. The stay requested by Jupiter was denied by this court on February 6, 1969, so the December 13 order remains in effect.

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[2] The Commission stated in its December 13 order that the amount due as of July 31, 1968, was approximately $650,000, and was accumulating at the rate of about $25,000 per month. *See* 40 F.P.C. at 1456, 1458 n.6.

The Jupiter-PKM dispute presents three questions for decision by this court: (1) whether the Commission properly required Jupiter to pay the 18.5 cent rate, without set-off; (2) whether the December 13 enforcement order exceeded the Commission's authority; and (3) whether the Commission has jurisdiction to certify rates for the transportation of liquid condensates as part of the natural gas stream.

A. *The Validity of the 18.5 Cent Rate*

Everyone in this case agrees that gas companies must pay the filed rate for jurisdictional sales or services under the Natural Gas Act. *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). Jupiter cannot prevail in its attack on the 18.5 cent rate set in Opinion 470 unless it shows that the rate is unlawful. To do so, Jupiter asserts that 18.5 cents is *higher* than the rate provided in its contract with PKM and thus unlawfully relieves PKM of a bad bargain, contrary to the rule of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). Under the *Mobile* rule, a gas company many not unilaterally increase its contract rate and the Commission is without authority to approve such an increase unless, under the holding in the companion case, *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), the contract rate is so low as to affect the public interest adversely.

Jupiter claims that the 18.5 cent rate is unlawful under *Mobile* because its contract with PKM permits it to deduct a 2.4 cent spread from whatever price is received from Tennessee. Thus, when its resale price to Tennessee was fixed at 19.5 cents in the rate settlement, the con-

tract price payable to PKM became 17.1 cents. The contract, however, does not support this contention.

Provisions of the Jupiter-PKM contract on file with the Commission protect PKM's price for gas from any reduction in Jupiter's charges, whether the reduction is regarded as a reduction of Jupiter's spread or its resale price to Tennessee. Jupiter's claim that its price payable to PKM is to be reduced by the amount of any reductions in its price received from Tennessee was rejected by the examiner in the rate proceeding. He relied on the following supplement to the 1953 agreement, which became effective in 1958:

> "If at any time and for any reason Marine (now Jupiter) is required to reduce the amount per Mcf specified . . . as the adjustment to be made to the applicable price . . . then the price payable to Phillips and Kerr-McGee . . . shall not thereby be reduced, but shall be increased by an amount per Mcf equivalent to the amount per Mcf by which such [adjustment] amount . . . is reduced, to the end that Phillips and Kerr-McGee will receive for gas delivered . . . the applicable price per Mcf less only the amount per Mcf to which said [adjustment] amount . . . is reduced. . . ."

Jupiter Corp., 35 F.P.C. 1091, 1121-22 (1966). The examiner concluded that as a result of this "contractual shuttle-cock," if the adjustment amount is reduced, the price to the producers shall be increased by the amount of the reductions. Translated into figures, the provision means that if the "applicable price" payable by Tennessee is reduced to 19.5 cents and the 2.4 spread is subtracted, the price to PKM does *not* thereby become 17.1 cents, because the amount of the reduction, 1.4 cents, is to be added to the price payable to PKM, bringing the total to 18.5 cents.

The Commission's action setting PKM's price at 18.5 cents and Jupiter's resale price to Tennessee at 19.5 cents fits the terms of the above-quoted provision. The Commission has reduced the "adjustment amount" in the only way it could.[3] This reading of the contract as insulating PKM from reductions in Jupiter's rates chargeable to Tennessee is consistent, moreover, with the contract provision stating that Jupiter's transportation, separation and delivery of the condensates to PKM shall be "free of cost and expense to Phillips and Kerr-McGee."

We find no support for Jupiter's claim that it is entitled under its contract to convert that portion of the spread no longer chargeable to Tennessee into a charge to PKM for condensate services. The assertion that 18.5 cents exceeds the contractual price for PKM's gas and is unlawful under *Mobile* is groundless.

We have passed over the question of the timeliness of Jupiter's *Mobile* attack on Opinion 470 setting the 18.5

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[3] Even if the reduction were treated as reducing only the "applicable price" payable by Tennessee, with no effect on the "adjustment amount," the contract provides that the price payable to PKM is to be equal to the price per Mcf "provided to be paid" by Tennessee, "regardless of whether such price is actually paid," less the adjustment amount. Thus the transportation charge is to be deducted from the contract price payable by Tennessee, and not from the lower price set by the Commission under its certificate authority.

From Jupiter's standpoint, the contract problem is created by the fact that the transportation charge is stated as a deduction from the price payable by Tennessee. The Commission could not set a fair price chargeable to Tennessee except by adding a reasonable transportation charge to the area rate of 18.5 cents set for PKM's gas. If the effect of this procedure was to deny Jupiter payment for non-jurisdictional condensate services, the cause was Jupiter's agreement to a contract which included them in a charge to Tennessee, a fact Jupiter has recognized. *Cf.* Jupiter Corp. v. F.P.C., 362 F.2d 92 (7th Cir. 1966).

cent rate and the rate settlement setting the 19.5 cent rate, neither of which was appealed.[4] Perhaps recognizing that its *Mobile* argument has come to court late, Jupiter has advanced several other arguments, apparently designed to preserve its right to complain of the final orders on which the declaratory orders under review are based. Because we have dealt with its *Mobile* claim on the merits, Jupiter's other contentions require only brief comment.

Jupiter's response to the orders requiring payment of the 18.5 cent rate has been a long and elaborate demurrer. Choosing to skirt the merits of the *Mobile* attack on the filed rate, Jupiter instead makes the following assertions: (1) Opinion 470 setting PKM's rate at *no more than* 18.5 cents supports its contractual argument that the reduction in its transportation charge to Tennessee may be recouped from PKM, (2) the Commission has conceded that Jupiter has a contractual right to payment for non-jurisdictional services, and (3) any determination of the rate payable to PKM must await the outcome of the litigation in the Superior Court of Cook county. These arguments cannot be sustained.

First, it is clear that the ordering paragraph of Opinion 470 sets the rate payable to PKM at *no more than* 18.5 cents because that rate was a reduction from the

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[4] Jupiter's appeal from the Commission's amendment of its temporary certificate at the 20.9 cent price in Opinion 470 was dismissed on its own motion as part of the 1966 rate settlement. Jupiter Corporation v. F.P.C., No. 15,469 (7th Cir., Nov. 10, 1966); *cf. Jupiter Corp.*, 35 F.P.C. 1091, 1093 (1966).

prevailing price.[5] The reference in the body of the opinion to an 18.5 cent rate "as limited by contractual rights" will not sustain the burden of Jupiter's argument; the opinion expressly contemplated reductions in Jupiter's spread and provided only a temporary certificate for the 20.9 cent rate to Tennessee. PKM, by contrast, received a permanent certificate for the 18.5 cent rate.

Second, the Commission has conceded nothing but the possibility that Jupiter has an equitable claim, disputed by PKM, for the reformation of its contract to require payment by PKM for nonjurisdictional services now that their cost is no longer being absorbed in an excessive charge to Tennessee. The Commission has never conceded that Jupiter is entitled *under the contract as written* to recoup any reductions in the spread chargeable to Tennessee from PKM. Indeed, the Commission scarcely had reason or occasion to do so. Jupiter's contractual argument was rejected by the examiner in the rate proceedings, and its settlement proposals stated in bold-

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[5] The rate reductions ordered in Opinion 470 took place against this background. Under PKM's 1953 contract for the sale of gas to Tennessee's predecessor in interest, Niagara Gas Company, the gas was sold at 16.4 cents per Mcf for export to Canada. The contract contained an escalation clause providing for price revisions every five years, pegged to prevailing area prices. In 1958, the price to Niagara was renegotiated at 21.3 cents, only days before Tennessee succeeded to Niagara's interest in the gas supply. Beause the ultimate sale previously had been to Canada, the sale was not considered to be jurisdictional and PKM was not required to file a notice of the increase with the Commission, making the rate change subject to review. Although one examiner who considered the matter questioned an increase applicable to Tennessee because it was unrelated to the producer's costs, the Commission did not disturb the 21.3 cent price until completion of the area rate proceedings relied upon in Opinion 470 setting the 18.5 cent rate. *Phillips Petroleum Co.*, 34 F.P.C. 486, 491 (1965); *Union Texas Petroleum*, 32 F.P.C. 254 (1964).

faced type that reformation of its contract was required to enable it to collect payment for condensate services. Jupiter paid the 18.5 cent rate for nearly a year before filing its suit, based on its present theory of the contract, in the Cook County court. When Jupiter finally made its position on the contract somewhat more explicit in its petition for rehearing of the April 3 order, the Commission rejected it in the opinion denying rehearing.

Jupiter's related argument that the Commission has somehow acquiesced in resolution of the filed rate issue by the Cook County court is similarly without merit. Jupiter has, it is true, attacked the 18.5 cent rate in its contract action. It seeks not reformation but recovery of the full 1.4 cent reduction claimed to be due it under the contract, and may have intended to urge its *Mobile* argument in reply to PKM's likely defense that 18.5 cents is the lawful filed rate for its gas. We find, however, no authority for deference to state court adjudication of filed rates in the natural gas industry.[6] An attack on a rate order is the classic case for primary jurisdiction in an administrative agency. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *cf. Ambassador, Inc.* v. *U.S.*, 325 U.S. 317 (1945). As the *Mobile* case itself makes clear, Jupiter's challenge to the

[6] *Pan American Petroleum Corp.*, 32 F.P.C. 966 (1964), cited by Jupiter, gives no support to deference to a state court adjudication of the lawfulness of a filed rate for natural gas. There the Commission merely awaited a state court interpretation of a state school tax which had a bearing on contractual issues before the Commission. The Commission's rejection of Jupiter's *Mobile* attack on a filed rate for jurisdictional services was, moreover, fully consistent with leaving it to the Cook County court to decide whether Jupiter has an equitable claim to reformation of its contracts to recover compensation for non-jurisdictional services.

validity of the 18.5 cent rate was properly addressed to the Commission and subject to judicial review on appeal from its orders.

B. *The Validity of the Enforcement Order of December 13, 1968*

Because we uphold the Commission's declaratory orders of April 3 and May 24, 1968, the sole question presented here relates to the Commission's authority to enter the enforcement order of December 13, 1968, *Jupiter Corp.*, 40 F.P.C. 1455, and the possibility that the Commission abused its discretion in fashioning the administrative sanctions. Jupiter attacks the order on two grounds. First, it argues that the order requiring Tennessee to pay 18.5 cents directly to PKM for the account of Jupiter and 1 cent directly to Jupiter and requiring Jupiter to pay over shortages withheld from the 18.5 cent rate was an invalid modification of the declaratory orders pending their appeal. 15 U.S.C. § 717r(b) (1964). We disagree. The Natural Gas Act provides that orders of the Commission shall not be stayed pending appeal unless the reviewing court grants a stay. 15 U.S.C. § 717r(c). Only after the December 13, 1968, order did Jupiter apply for stay of the outstanding orders here under review, and its application was denied. In the absence of a stay, the Commission's orders were "entitled to have administrative operation and effect during the disposition of [these] proceedings." *Dyer* v. *S.E.C.*, 289 F.2d 242, 244 (8th Cir. 1961). We think this includes compliance by parties subject to them. The course of these proceedings, traced in the record before us, supports the Commission's judgment that its implementing order was necessary to assure Jupiter's compliance with

the declaratory orders. While Jupiter claims it did not interpret the Commission's declaratory orders to require it to pay the 18.5 cent rate without set-off, we find in them slight basis for confusion. An otherwise valid enforcement order is not transformed into an invalid modification of prior orders pending appeal whenever a noncomplying party claims to have misunderstood their meaning.

Jupiter's second argument is that the Commission's only recourse in the face of its failure to comprehend or comply with the orders was to bring an action for mandamus in a Federal District Court, as authorized by section 20 of the Natural Gas Act, 15 U.S.C. § 717s (1964). The Commission maintains that the mandamus remedy is permissive, not exclusive, and enables it to seek judicial assistance in enforcing its orders over parties not otherwise fully subject to its administrative jurisdiction. The Commission issued the December 13 order under section 16 of the Act, 15 U.S.C. § 717o (1964), which empowers the agency to issue such orders "as it may find necessary or appropriate to carry out the provisions" of the Act.

The language of section 20 supports the conclusion that a judicial remedy is discretionary, *cf. General Telephone Co. of California* v. *F.C.C.*, No. 22,106 (D.C. Cir. April 30, 1969), and we think the enforcement order was a permissible step to secure compliance with the rate orders. Interpreting section 16's counterpart in the Federal Power Act, 16 U.S.C. § 825h (1964), this court observed that

> While such "necessary or appropriate" provisions do not have the same majesty and breadth in statutes as in a constitution, there is no dearth of decisions

> making clear that they are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.
>
> . . . .
>
> Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.

Niagara Mohawk Power Corp. v. *F.P.C.*, 126 U.S. App. D.C. 376, 381-82, 379 F.2d 153, 158-9 (1967). We recognize with the Commission that the remedy chosen is "somewhat unusual," but we find that in the circumstances of this case, the order was reasonably calculated to prevent further aggregation of sums owed to PKM under the outstanding orders, and conformed to the purposes of the Act by enforcing the lawful filed rate as to all parties.

C. *Jurisdiction To Regulate the Rates Charged for Transportation of Liquid Condensates*

The Commission stated in its declaratory orders that Jupiter would be required to obtain Commission approval of rates charged for the transportation of liquid condensates in the event that it was held to be entitled to compensation for this service in its Illinois law suits. Jupiter contends that the Commission's stated intention to regulate charges for this service inexplicably singles out Jupiter for

regulation not imposed on other pipelines, and exceeds the Commission's jurisdiction under the Natural Gas Act. We think it appropriate to comment on the first point, but unnecessary to decide the second.

Jupiter relies heavily on the Commission's *Notice of Proposed Statement of General Policy*, 33 Fed. Reg. 2860 (1968), to show that the Commission's assertion of jurisdiction to regulate rates for transportation of liquids is inconsistent with its previously stated position on the question. The Notice states an intention to allocate transportation costs for condensates and to deduct them from the jurisdictional cost of service in reviewing and setting rates chargeable to a pipeline's sales of natural gas for resale, regardless of whether a charge for liquid transport is actually made to the producer. The Commission's objective is to avoid charging the pipeline customer for a portion of transportation facilities not used for its benefit.

The Commission observed in the Notice that costs for condensate transport may be significant in some areas, referring to transport of liquids produced offshore to onshore extraction plants (the situation in this case), but stated that on an overall basis, the problem will not be substantial. The Notice then states:

> Of course, we reserve the right to consider the problem in any future area proceeding where it appears to involve a generally significant factor in pipeline costs. We have reached a tentative conclusion that it might be preferable and sufficient for purposes of consumer protection, to allocate out of the cost of service applicable to other jurisdictional services the liquid transportation costs in pipeline cases, leaving it to the pipelines to negotiate fair compensation from the owner of the liquids or the liquefiable hydrocarbons.

The Commission's tentative policy rests on the assumption that it has jurisdiction to regulate charges for transportation of liquids, but because of the generally insubstantial costs,[7] there will ordinarily be no need to exercise it. If a pipeline's costs and charges for liquid condensate transportation are, for some reason, substantial, the tentative policy is by its terms inapplicable. We think, therefore, that the Notice does no more than reserve the question of regulation of rates for condensate transport for a case where these may be significant.

The Commission's assertion of this jurisdiction in this case anticipates the possibility of a favorable decision by the Illinois courts on Jupiter's claims for compensation for condensate services, including the transportation portion. In our view, the jurisdictional issue will not be ripe for decision until it is decided that Jupiter is entitled to compensation for this part of the service. First, it is possible that Jupiter will be held to be entitled to nothing for transportation of condensates or to be due an amount so insubstantial that the Commission will abstain from exercising jurisdiction. Of equal significance is the fact that the jurisdiction issue is not a simple one, to be resolved in the abstract by trading definitions of natural gas. The authority to regulate rates for transportation of liquid condensates is a matter to be considered against the background of the Commission's overall responsibility for rates and charges by natural gas companies "for or in connection with the trans-

[7] In this case, for example, the Commission agreed to a settlement rate of 1 cent per Mcf for Jupiter's transportation of gas. Since the liquid condensate portion of the gas stream is estimated at 1.5 to 5% of the total gas stream, it is evident that the cost of liquid transport is comparatively insubstantial. The examiner's findings as to the costs of Jupiter's service confirm this conclusion. *Jupiter Corp.*, 35 F.P.C. 1091 (1966).

portation or sale of natural gas" subject to its jurisdiction. 15 U.S.C. § 717c(a)(1964). The mere possibility that Jupiter will be entitled to payment for this service does not suffice for the concrete record required for a reasoned judgment on a question of this kind.

In summary, we find that Jupiter is and has been obligated to pay the filed rate of 18.5 cents without set-off. The certificate rate does not exceed the contract price, and accordingly is not unlawful under the rule of the *Mobile* case. The possibility that Jupiter will recover some payments from PKM for condensate services in its Illinois lawsuit may eventually mean a reduction of total amounts owed by Jupiter to PKM, but this contingency does not entitle Jupiter to set off unliquidated claims against the filed rate for jurisdictional services. In the absence of a stay of the declaratory orders under review, the Commission's administrative order enforcing Jupiter's previously determined obligations was a valid exercise of discretion. Its assertion of jurisdiction to regulate rates for transport of liquid condensates presents no concrete question which must be decided at this time.

III. The Jupiter-Union-Tennessee Dispute

Until 1962, the Pure Oil Company (Union's predecessor) sold gas directly to Tennessee at a flat contract rate of 21.3 cents per Mcf. In an entirely separate transaction, Pure paid Jupiter for transportation and other services under a 1957 "Hydrocarbon Gathering and Separating Agreement" providing for an average charge of 3.4 cents per Mcf based on volumes of gas gathered. The Jupiter-Pure contract rate covered Jupiter's services "in gathering the gas and condensate subject to this agreement and separating condensate from the gas at [Jupiter's] plant, and for performing all

other services provided for hereunder, exclusive of compression . . ."

In 1958, Pure filed a rate increase applicable to Tennessee which was suspended by the Commission pending investigation of its reasonableness. Pure then filed a settlement proposal. A settlement agreement requiring a reduction of the total rate was concluded on November 27, 1962. *Pure Oil Co.*, 28 F.P.C. 889 (1962). Approval of the settlement was conditioned upon conformity to a rate schedule which provided that Pure would charge Tennessee 16.75 cents per Mcf for gas, plus transportation charges. 28 F.P.C. at 892, 894. In an annotation to the rate schedule, transportation charges were described as follows:

> Jupiter Oil Corporation charges Pure for transportation from the field . . . to [the] Tennessee Gas Transmission Company main line on shore. The charges are 4.0¢ per Mcf . . . for the first 62.5 MMCDF and 3.0¢ per Mcf . . . for the remainder. These charges to be recouped from Tennessee as part of the rate will be only those actually paid by Pure to Jupiter . . . .

Id. at 895 n.9. The opinion approving the composite settlement rate stated that "Pure has agreed to charge only that amount it actually has to pay for the transportation of the gas onshore, and to make any necessary filing in the future to reflect any change that may be made therein" (28 F.P.C. at 891). In a footnote to the appendix of rates, the Commission observed that "[a]ny reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure." 28 F.P.C. at 895 n.9.

From 1962 to 1966, Tennessee reimbursed Union at the 3.4 cent rate that Union paid Jupiter. Then came the 1966 rate settlement, reducing Jupiter's transportation charges to Tennessee to 1 cent per Mcf. After the settlement, Jupiter

began billing Union 1 cent for gas transported and 2.4 cents for the other services referred to in the 1957 agreement. Union refused to pay separate invoices, and after its offer to amend the contract to a unitary charge of 1 cent was rejected by Jupiter, Union paid Jupiter the 3.4 cents as a single rate. This charge it passed on in full to Tennessee.

Tennessee, after a short time, refused to pay more than the base price, and Union ceased all payments to Jupiter. Tennessee filed a petition with the Commission seeking to establish its duty to pay only the 1 cent settlement rate. Jupiter then sued Union in the United States District Court for the Northern District of Illinois, claiming that it was still entitled to the full 3.4 cents. Union impleaded Tennessee. Tennessee then successfully moved for suspension of the suit pending Commission action on Tennessee's petition.

In its April 3 order, the Commission declared that Union is obligated to pay Jupiter 1 cent per Mcf for gas transportation pursuant to Jupiter's amended Gas Rate Schedule and to charge Tennessee *no more than* 1 cent for transportation over and above its base rate.[8] Union contests the order on the ground that the 1962 Pure (Union) settlement requires Tennessee to reimburse it for whatever charges Union pays Jupiter, and that the base rate plus this total reimbursement is the filed rate for its gas. Union also asserts that the Commission improperly denied it an evidentiary hearing.

Union urges this interpretation of the 1962 settlement because of the impact of the 1966 reduction in Tennessee's

[8] The Commission's assertion of jurisdiction to regulate the rates for transport of liquid condensates also applies to the Jupiter-Union controversy, and is contested by Jupiter as an intervenor in the Union case. *See* part II C, *supra*.

transportation rate coupled with Jupiter's persistence in charging Union 3.4 cents, but the question can be resolved only on the basis of what was contemplated in the 1962 settlement. The context of that settlement refutes Union's claim.

The 1962 settlement does not state in terms that Tennessee's reimbursement of Union's payments for transportation of gas referred only to gas delivered to Tennessee, but this is the only reasonable construction of the agreement. Before the settlement, Tennessee was paying a flat price for gas. The change to the two-part price, with separate charges for gas and transportation, can hardly have been intended to obligate Tennessee to pay Union's costs for services unrelated to Tennessee's gas—costs that Tennessee could not support in a rate case related to its own gas services. This result would be at odds with elementary principles of rate regulation.

In addition, under Union's vigorously stated view of the Jupiter-Union contract, Union could not have expected to collect anything other than transportation charges from Tennessee any more than the Commission intended for Tennessee to pay for other services. Union claims that the unitary rate in the 1957 Jupiter-Union agreement provides for payment only for transportation of gas, and that the condensate services were to be free. Thus, Union would have expected that a reduction in Jupiter's transportation charges would reduce what Union could recover back from Tennessee.

The dispute between Union and Jupiter arises from the fact that Jupiter claims that the unitary rate in its 1957 agreement with Union includes payment for services related to the condensate services, that these were not to be free,

and that when the Commission reduced the transportation portion of the unitary rate, Jupiter was entitled to collect the remainder of the 3.4 cents from Union as payment for condensate services. The merits of this controversy over the 1957 agreement are irrelevant, however, to a decision on the validity of the Commission's declaratory order. The 1957 agreement between Jupiter and Union affects the charges recoverable by Union from Tennessee only to the extent that it was incorporated into the 1962 composite settlement rate; it was incorporated only to the extent of setting the initial rate for transportation of gas to Tennessee. The parties to the 1962 settlement thought they were agreeing upon a transportation charge for Tennessee. That Jupiter now claims to be entitled to collect more than that charge from Union to cover condensate services under its 1957 agreeement with Union does not affect Tennessee's undertaking, despite Union's discomfiture.

Union also alleges that the Commission erred in denying it a hearing requested in Union's letter of October 18, 1967. First, the alleged request for a hearing was ambiguous at best, and could reasonably have been interpreted as a request for expedition of whatever proceedings the Commission undertook in ruling on the motions resulting in the orders under review.[9] Granting Union a generous benefit of the doubt, we turn briefly to the asserted grounds for a hearing.

Union says it would have shown that the Commission was wrong to state in its April 3 order that it would be

[9] Union's letter to the Commission, dated October 18, 1967, concluded with the statement that "Union respectfully urges that the Commission schedule its hearings in the captioned proceedings at the earliest possible date due to the growing procedural complexities of these complicated, multi-party proceedings, and the unabated inequities inherent in further delay thereof."

"most peculiar" for Tennessee to agree to pay for transportation of condensates for Union, since it is common practice for pipelines purchasing gas offshore and transporting it for producers to deliver condensates without a specific charge. This common practice is both familiar to the Commission[10] and inapposite to the case. Union concedes that "typically the pipeline that bears the cost of the additional services relating to condensates and liquefiable hydrocarbons performs the functions itself and therefore has greater control over the costs of rendering such services." Reply Brief for Petitioner Union Oil Co. at 15. It would indeed be peculiar for Tennessee to agree to bear the costs of a third party, Jupiter, for services solely benefitting Union. This argument, and the other asserted grounds for a hearing, relate primarily to factual issues in Union's contractual dispute with Jupiter and are of little relevance to Tennessee's obligation under the filed rate. In any event, Union raises no substantial issues requiring the presentation of evidence not already before the Commission during these protracted proceedings.

The orders of the Commission are

Affirmed.

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[10] The Commission's awareness of the fact that transportation of condensates is not a costly service and is often performed by pipelines without charge underlies its *Notice of Proposed Statement of General Policy*, regarding pipeline costs allocable to the transportation of liquids and liquefiable hydrocarbons. *See* 33 Fed. Reg. at 2860.

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No. 1045

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

THE JUPITER CORPORATION, *Petitioner,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS PHILLIPS PETROLEUM COMPANY AND KERR-McGEE CORPORATION

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INDEX

	Page
Questions Presented	1
Statement	2
Argument	5
Conclusion	11

TABLE OF CITATIONS

Cases:

FPC v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955) 9

Jupiter Corp. v. *FPC*, 7th Cir., No. 15,469 3

United Gas Pipeline Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) 5, 6-7, 9-10

Statute:

Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717 *et seq.*:

Section 16, 15 U.S.C. § 717*o* 5
Section 19(a), 15 U.S.C. § 717r(a) 6, 10
Section 19(c), 15 U.S.C. § 717r(c) 4

Administrative Material:

Phillips Petroleum Co., 34 F.P.C. 486 (1965) 3

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BRIEF IN OPPOSITION FOR RESPONDENTS PHILLIPS PETROLEUM COMPANY AND KERR-McGEE CORPORATION

QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming the Federal Power Commission by reaching an issue that had been urged upon the court by petitioner, and deciding that issue on grounds that had support in the record before the Commission and that the Commission itself had relied upon in ruling against petitioner.

2. Whether the court of appeals erred in upholding an Order entered by the Commission which was designed to insure compliance by petitioner with other Commission Orders on review before the court of ap-

peals which had not been stayed by the Commission or by any court but with which petitioner refused to comply.

STATEMENT

As evident from the length and detail of the Commission Orders and the opinion of the court of appeals, this proceeding arises in a complex factual setting. For the purposes of considering the petition, however, the facts may be simply stated.

Phillips Petroleum Company and Kerr-McGee Corporation ("Phillips-Kerr-McGee") are joint owners of leases on gas-producing properties in the Rollover Field, an area located in the Gulf of Mexico, off the shore of Louisiana. Pursuant to contracts entered into in 1953, and since amended, Phillips-Kerr-McGee sell to petitioner gas produced by them in this Field, and petitioner transports the gas to shore and there resells it to Tennessee Gas Pipeline Company ("Tennessee"). (J.A. 12).[1] Under the contract with Phillips-Kerr-McGee, petitioner also transports to shore the condensate produced with such gas, mechanically separates the condensate from the gas, and delivers the condensate to Phillips-Kerr-McGee. (J.A. 14).

This contract provides specifically that petitioner's transportation, separation, and delivery of the condensate to Phillips-Kerr-McGee shall be "free of cost and expense to Phillips and Kerr-McGee." (J.A. 14). Petitioner's compensation for all of its activities, therefore, is the difference between the amount it obtains on

[1] The initial contract, excerpts from which are set out at J.A. 12-21, was with petitioner's predecessor, Marine Gathering Company, which in turn resold the gas to Niagara Gas Transmission Limited. (See J.A. 12-13). Niagara's interest was assigned to Tennessee in 1958. (See J.A. 24-25).

resale of the gas to Tennessee and the amount it pays for the gas to Phillips-Kerr-McGee.

There is no dispute that prior to the issuance of Commission Orders in 1965 and 1966, petitioner received a price from Tennessee of 21.3 cents per Mcf (thousand cubic feet) of gas and paid Phillips-Kerr-McGee 18.9 cents per Mcf, retaining a "spread" of 2.4 cents per Mcf. (J.A. 24-25).

The Commission's 1965 Order reduced the price to be paid by petitioner to 18.5 cents per Mcf. *Phillips Petroleum Co.*, 34 F.P.C. 486. The 1966 Order, entered on the basis of settlement offers proposed by petitioner (J.A. 234, 255) after the issuance of an Order less favorable to petitioner by a Commission Hearing Examiner (35 F.P.C. 1095, J.A. 150), reduced the price to be received by petitioner to 19.5 cents per Mcf, thus reducing its "spread" to 1 cent per Mcf. (35 F.P.C. 1091, J.A. 282).[2]

Petitioner refused to comply with these Orders. It received payments from Tennessee at the 19.5 cent rate but took the position, in litigation instituted in the Circuit Court of Cook County, Illinois, that it was entitled to retain a "spread" of 2.4 cents per Mcf and to pay Phillips-Kerr-McGee only 17.1 cents per Mcf instead of at the 18.5 cent per Mcf rate ordered by the Commission. Petitioner refused to make payments at the 18.5 cent per Mcf rate.

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[2] The Hearing Examiner had ordered a "spread" of .632 cents per Mcf. (See 35 F.P.C. at 1092, J.A. 284). As part of the settlement, under which this "spread" was increased to 1 cent per Mcf, petitioner agreed to dismiss its then-pending appeal from the Commission's 1965 Order setting an 18.5 cent per Mcf rate to be paid by petitioner to Phillips-Kerr-McGee. (35 F.P.C. at 1092-93, J.A. 285). The appeal was dismissed on November 10, 1966. Jupiter Corp. v. FPC, 7th Cir., No. 15,469.